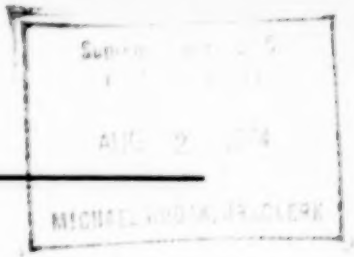

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-1148

In the matter of the APPLICATION OF CHERYL SPIDER DECOTEAU, natural mother and next friend, and on behalf of ROBERT LEE FEATHER and HERBERT JOHN SPIDER for a WRIT of HABEAS CORPUS.

Petitioner,

v.

THE DISTRICT COUNTY COURT FOR THE TENTH JUDICIAL DISTRICT,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

BRIEF FOR THE PETITIONER

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In the matter of the APPLICATION OF CHERYL SPIDER DECOTEAU, natural mother and next friend, and on behalf of ROBERT LEE FEATHER and HERBERT JOHN SPIDER for a WRIT of HABEAS CORPUS,

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THE DISTRICT COUNTY COURT FOR THE TENTH JUDICIAL DISTRICT,

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ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF SOUTH DAKOTA

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the South Dakota Supreme Court is reported at ___S.D. ___, 211 N.W.2d 843 (1973) and printed in Appendix "A" of the Petition for Certiorari (Pet. App.) at 1a. The Findings of Fact and Conclusions of Law and Judgment of the South Dakota Circuit Court for the Fifth Judicial Circuit are unreported. They are printed in Pet. App. B 7a, 10a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(3). The final judgment of the Supreme Court of the State of South Dakota was entered on October 31, 1973. In accordance with 28 U.S.C. § 2101 (c), the petition for a writ of certiorari was due on or before January 29, 1974. The petition was filed January 25, 1974 and was granted June 3, 1974.

STATUTES INVOLVED

The Treaty of February 19, 1867, 15 Stat. 505, Sections 26-30 of the Act of March 3, 1891, 26 Stat. 989, 1035,[1] and 18 U.S.C. § 1151 are set out in the Appendix (App.) hereto at 1, 7 and 16 respectively.

QUESTION PRESENTED

Whether the State of South Dakota has civil jurisdiction over indians for acts or omissions committed on Lake Traverse Reservation patented lands opened to non-Indian homesteading by the Act of March 3, 1891.

STATEMENT OF THE CASE

On December 17, 1971 South Dakota brought dependency and neglect proceedings against Cheryl Spider DeCoteau, an enrolled member of the Sisseton-Wahpeton Sioux Tribe. The State sought to terminate the parental rights of Mrs. DeCoteau to her minor children, Robert Lee Feather and Herbert John Spider. All of the incidents constituting the alleged dependency and neglect had occurred within the exterior boundaries of the Lake Traverse Reservation, as established under the 1867 Treaty, approximately 50 percent of the incidents occurring on federal trust lands and approximately 50 percent of the incidents occurring on "surplus" lands opened for homesteading in 1891 and patented to non-Indians. None of the incidents occurred on land (sections 16 and 36) set aside for common school purposes by the act of March 3, 1891.

[1] These are the only sections of the Act that pertain to the Lake Traverse Reservation.

The District County Court for the Tenth Judicial District assumed jurisdiction, and, on December 17, 1971, entered an order of temporary foster care for Herbert John Spider. On August 4, 1972 Mrs. DeCoteau moved the District County Court to dismiss the proceedings on the ground that all incidents giving rise to said proceedings involved Indians and occurred in Indian Country and that, therefore, the Court lacked jurisdiction. The motion was denied on August 29, 1972, the Court ruling that the state courts have jurisdiction over Indians for actions occurring on non-Indian patented lands within the confines of the reservation.

On August 4, 1972 the District County Court continued its December 17, 1971 custody order with respect to Herbert John Spider and issued a custody order that Robert Lee Feather remain in the foster care arranged for him by South Dakota since March 12, 1971.

On August 31, 1972 Cheryl Spider DeCoteau petitioned the South Dakota Circuit Court for the Fifth Judicial Circuit for a writ of habeas corpus. That Court found that petitioner and her children are duly enrolled members of the Sisseton-Wahpeton Sioux Tribe located on the Indian reservation where all of the alleged acts or omissions resulting in the dependency and neglect proceedings and custody orders occurred. The Court ruled, however, that incidents occurring on non-Indian patented

lands within the treaty boundaries of the Lake Traverse Reservation did not take place in "Indian Country," and that, therefore, the District County Court's exercise of dependency and neglect jurisdiction and issuance of custody orders were proper. Accordingly, the Circuit Court denied the writ of habeas corpus.

Cheryl Spider DeCoteau appealed, assigning as error the Circuit Court's "conclusion of law. . .stating that the District County Court for the Tenth Judicial District has civil dependency and neglect jurisdiction over members of the Sisseton-Wahpeton Sioux Tribe residing within the exterior boundaries of the Lake Traverse Indian Reservation as established by the Treaty of February 19, 1867 when certain acts or omissions constituting a cause of action under the dependency and neglect laws of the State of South Dakota occur on non-Indian patented lands within the boundaries of said Reservation."

On October 31, 1973 the South Dakota Supreme Court filed its opinion affirming the Circuit Court's judgment. The Supreme Court ruled that the Act of March 3, 1891 disestablished the reservation status of the non–Indian patented portions of the Lake Traverse Reservation. In effect, the Court below further ruled that these portions of the 1867 treaty reservation are not Indian Country within the meaning of 18 U.S.C. §1151.

SUMMARY OF ARGUMENT

The Lake Traverse Reservation, set aside by the Treaty of February 19, 1867 as a permanent reservation, from the date of its creation has been "Indian Country" under the jurisdiction of the United States and the Sisseton-Wahpeton Sioux Tribe. The commitment of the United States to the maintenance of a permanent

reservation was reconfirmed in the Act of June 24, 1874. The Act of March 3, 1891,which opened surplus lands of the reservation to settlement did not disestablish or diminish the reservation. That Act followed the general pattern of surplus land statutes and provided for allotments to each Indian who had not been allotted; for withholding lands for religious purposes; and for the remaining "surplus" lands to be subject to entry under the homestead and townsite laws. The United States acted as trustee and credited the proceeds to the trust account of the Tribe, with the funds to be used for the education and civilization of the Sisseton and Wahpeton Sioux. The Act, on its face, contains no language that expressly or by innuendo alters the boundaries of the reservation.

The surrounding circumstances and legislative history of the 1891 Act, subsequent Federal enactments, and the consistent treatment and administration of the reservation as undiminished by the Department of the Interior unambiguously support the continued existence of the reservation as established in 1867.

The Supreme Court of the State of South Dakota, relying on the authority of the recently overruled and long discredited decision, *DeMarrias v. State of South Dakota*, 206 F. Supp. 549 (D.S.D. 1962), concluded that by the 1891 Act the Sisseton and Wahpeton Sioux sold portions of their reservation outright to the United States and the United States did not act as a trustee of the Indians in the transaction. The reservation status of the sold areas was terminated. In reaching this interpretation, the Court failed to apply time-honored rules for the construction of surplus land statutes; misunderstood the consequences for reservation status of allotments and the

issuance of patents to unallotted and unreserved lands pursuant to the General Allotment Act and special legislation enacted thereunder; and d'd not recognize the continuous legislative and executive treatment of the reservation as undiminished.

The Act of August 15, 1953 and Act of April 11, 1968 provide the only Congressionally authorized formulas for state assumption of jurisdiction over Indians in Indian Country. South Dakota has never obtained jurisdiction under these Acts. The assertion of jurisdiction by South Dakota to adjudicate the dependency and neglect of Petitioner's two children, both members of the Sisseton-Wahpeton Sioux Tribe, impermissibly undermines Federally protected tribal self-government and strikes at the very core of the tribal relation and existence.

ARGUMENT

I.

THE LAW IS ESTABLISHED THAT STATE JURISDICTION DOES NOT EXTEND TO INDIANS IN INDIAN COUNTRY.

If an act or omission, proscribed under the laws of a State, occurs in "Indian Country," the State has no jurisdiction for the law is settled that State jurisdiction does not extend to Indians in Indian Country.[2] *Williams*

[2]South Dakota was admitted into the Union as a State on the express condition that its people do "agree and declare ... [that] Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States...." Enabling Act of February 22, 1889; c.180. 25 Stat. 676. Article XXII of South Dakota's Constitution makes the same disclaimer of jurisdiction. Neither the State, Congress or the Tribe have changed this. *State of South Dakota v. Molash*, __ S.D. __, 199 N.W.2d 591, 593 (1972).

v. Lee, 358 U.S. 217, 219 (1959); *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 168-169 (1973); *Warren Trading Post v. Arizona Tax Com.*, 380 U.S. 685, 687, fn. 3 (1965); *State ex rel. Merrill v. Turtle*, 413 F.2d 683, 684 (CA 9 1969); *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Res.*, 231 F.2d 89, 92, (CA 8 1956); *Handbook of Federal Indian Law*, Felix S. Cohen, 122-126 (GPO 1945); *Federal Indian Law*, 395-402 (GPO 1958).

The principle underlying these decisions is that Indian tribes retain all the powers of sovereignty, except as expressly diminished by Congress. Thus, in *Williams v. Lee, supra*, the Court stated:

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them. 358 U.S. at 220.

This principle was reaffirmed in *Kennerly v. District Court of Montana*, 400 U.S. 423, 426-427 (1971). These cases emphasize the supremacy and exclusivity of federal or tribal jurisdiction in Indian Country.[3]

[3]The term "Indian Country" embraces within it Indian reservations. "It is manifest that Indian lands, or the lands of an Indian within a reservation or on the public domain, all come in the same category, all such lands are equally Indian Country...." *Ex Parte Van Moore*, 221 F. 954 (D.S.D.1915). A reservation is "Indian Country simply because it had been validly set apart for the use of the Indians as such, under the superintendence of the government." *United States v. Pelican*, 232 U.S. 442, 449 (1914). This was the definition prior to the 1948 statutory definition contained in the Act of June 25, 1948; c. 645, 62 Stat. 757, 18 U.S.C. § 1151, and set out in full in the Appendix at 16.

[footnote continued]

All of the incidents constituting Petitioner's alleged dependency and neglect occurred within the 1867 Treaty boundaries of the Lake Traverse Reservation. In order to subject Petitioner and her children to its laws, South Dakota must demonstrate federal action that

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[footnote continued from preceding page]

Although 18 U.S.C. §1151 defines Indian Country for criminal jurisdiction purposes, as the only precise Congressional definition of the term, it has been repeatedly applied inferentially or directly in Indian civil jurisdiction cases. See e.g., *McClanahan v. State Tax Commission of Arizona, supra,* 411 U.S. at 177-178, fn. 17; *Kennerly v. District Court of Montana, supra,* 400 U.S. 424, 427, fn. 1; *Williams v. Lee, supra,* 358 U.S. at 220-222, fns. 5, 6, 10. *Annis v. Dewey County Bank,* 335 F. supp. 133, 134 (D.S.D. 1971); *Crow Tribe of Indians v. Deernose,* 158 Mont. 25, 487 P.2d 1133, 1135 (1971); *Sigana v. Bailey,* 282 Minn. 367, 164 N.W. 2d 886, 888-889 (1969); *Boyer v. Shoshone-Bannock Indian Tribes,* 92 Idaho 257, 441 P.2d 167, 170-171 (1968); *Kain v. Wilson,* 83 S.D. 482, 161 N.W.2d 704, 705 (1968); *Smith v. Temple* 82 S.D. 650, 152 N.W.2d 547, 548 (1967); *State ex rel. Adams v. Superior Court,* 57 Wash. 2d 181, 356 P.2d 985, 990 (1960). See also the court below.

A comparison of post-1948 statutory enactments pertaining to state assumption of criminal and civil jurisdiction over Indians reveals that Congress subscribes to the 18 U.S.C. §1151 definition of Indian Country for both criminal and civil jurisdiction purposes. Compare e.g., 18 U.S.C. §1162 (criminal) with 28 U.S.C. 1360 (civil), both included in the Act of August 15, 1953; c.505, 67 Stat. 588, 589; and 25 U.S.C. 1321 (criminal) with 25 U.S.C. 1322 and 1326 (civil), all included in the Act of April 11, 1968; 82 Stat. 78, 79, 80. There is an undifferentiated use of the term Indian Country in all of these statutes. See also, H.R. Rep. No. 848, 83d Cong., 1st Sess., 6 (1953). While recognizing that, like a state, the jurisdiction of a tribe has extraterritorial reaches, there is but one definition of Indian Country regardless of whether the jurisdiction exercised is criminal or civil.

disestablished or diminished these boundaries. If the boundaries today are coextensive with the original boundaries, the entire 1867 Lake Traverse Reservation is within Indian Country and South Dakota's jurisdiction does not extend to Indians thereon.

II.

CONTROLLING PRINCIPLES OF LAW COMPEL A STATUTORY CONSTRUCTION THAT ALL PATENTED AND OTHER LANDS, INCLUDING THE TOWNSITE OF SISSETON, WITHIN THE ORIGINAL EXTERIOR BOUNDARIES OF THE LAKE TRAVERSE RESERVATION ARE IN INDIAN COUNTRY.

In determining whether the Act of March 3, 1891, c. 543, 26 Stat. 1035, disestablished or diminished the Lake Traverse Indian Reservation, three general principles of statutory construction must be applied.

(1) Only Congress can disestablish, diminish, or alter the boundaries of an Indian reservation. Congress created the Lake Traverse Indian Reservation by the Treaty of February 19, 1867, 15 Stat. 505. The Court has ruled that when "Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress." *United States v. Celestine,* 215 U.S. 278, 285 (1909).[4] See also, *Mattz v. Arnett,* 412 U.S. 481, 504-505 (1973); *Seymour v. Superintendent,* 368 U.S. 351, 359 (1962); *United States ex rel. Feather v. Erickson,* 489 F.2d 99, 101 (CA 8 1973); *United States ex rel. Condon v. Erickson,* 478 F.2d 684, 689 (CA8 1973); and *City of New Town, N.D. v. United States,* 454 F.2d 121, 125 (CA 8 1972).

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[4] The *Celestine* doctrine has been codified in 25 U.S.C. §398(d) (Act of March 3, 1927; c. 299, 44 Stat. 1347).

The premise imposes on the State the burden of pointing to Federal action that disestablished the permanent Lake Traverse Reservation as described in the 1867 Treaty or in some way altered or diminished the boundaries of that Reservation. Unless the Act of March 3, 1891, *supra*, constitutes such Federal action, the State does not have jurisdiction.

(2) Courts will not lightly impute to Congress an intent to abridge or abrogate Indian treaty rights or statutory rights. Indian tribes have a special relationship with the United States. Chief Justice John Marshall described tribes as "domestic dependent nations" and characterized their relationship with the United States as that of a ward to its guardian. *Cherokee Nation v. Georgia*, 30 U.S.1, 17 (1831). *Seminole Nation v. United States*, 316 U.S. 286, 296, 297 (1942), enunciates the duty imposed on the United States and its courts in dealings with Indian tribes.

> Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, the United States has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.

Flowing from this recognition of the Indian's special status, the Supreme Court has posited

> the settled rule that, as between the whites and the Indians, the laws are to be construed most favorably to the latter. *Red Bird v. United States*, 203 U.S. 76, 94 (1906).

See also, *McClanahan v. State Tax Commission of Arizona, supra*, 411 U.S. at 174; *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *Peoria Tribe v. United States*, 390 U.S. 468, 472-473 (1968); *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 354 (1941); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 79 (1918); *United States v. Celestine, supra*, 215 U.S. at 290, *Winters v. United States*, 207 U.S. 564 (1908); *The Kansas Indians*, 72 U.S. 737 (1866); *Worcester v. Georgia*, 31 U.S. 515, 585 (1832); and Cohen, *Federal Indian Law*, 37 (G.P.O. 1945).

Doubtful provisions of statutes are resolved in the Indians' favor. Although Congress has general plenary power over its Indian wards, *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), the intention of Congress to abridge or abrogate rights or benefits secured to a tribe by treaty must be very clear.

> The intention to abrogate or modify a treaty is not to be lightly imputed to the Congress. *Pigeon River Improvement Co. v. Cox*, 291 U.S. 138, 160 (1934). See also, *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968).

(3) The opening of an Indian reservation to settlement by non-Indians is not inconsistent with its continued existence as a reservation. *Mattz v. Arnett, supra*, 412 U.S. at 497; *Seymour v. Superintendent, supra*, 368 U.S. at 349-350; *United States ex rel. Feather v. Erickson, supra*, 489 F.2d at 101; *United States ex rel. Condon v. Erickson, supra*, 478 F.2d at 689; *City of New Town, N.D. v. United States, supra*, 454 F.2d at 125.

Determination of the effect of the 1891 Act must start with these three general guiding principles. To these general principles, *Mattz* and *Seymour* add four specific rules for construction of statutes which open for settlement the surplus and unallotted lands within Indian reservations: (1) The language of the statute disestablishing, diminishing or altering a reservation "must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz v. Arnett, supra,* 412 U.S. at 505;[5] (2) statutory failure to lessen Federal trust responsibility for Indians having tribal rights on the reservation shall be construed as an intent to maintain the existence of the reservation undiminished; (3) subsequent enactments of Congress recognizing the continued existence of a reservation support the construction that the opening for settlement statute did not alter or diminish the reservation; and (4) construction and treatment of the opening for settlement statute by the officials and attorneys of the Department of Interior, the agency of government having primary responsibility for Indian affairs, shall be accorded special weight and consideration.

Whether the 1891 Act destroyed or diminished the Lake Traverse Reservation depends on the intent of Congress, ascertained from application of the above principles and analysis of the purposes of the Act and the understanding

[5] The Eighth Circuit holds that Congress must "expressly or by clear implication" diminish the boundaries of the reservation opened to settlement. *United States ex rel. Condon v. Erickson, supra,* 478 F.2d at 689, cited with approval in *Mattz v. Arnett, supra,* 412 U.S. at fn.23. See also, *United States ex rel. Feather v. Erickson, supra,* 489 F.2d at 101-102, where the Eighth Circuit indicates that its "clear implication" is equivalent to this Court's "clear from the surrounding circumstances and legislative history."

of Congress. *Seymour v. Superintendent, supra,* 368 U.S. at 356-357.

A. There is no express language in the 1891 Act that disestablishes or diminishes the Lake Traverse reservation.

The Lake Traverse Reservation was established by the Treaty of February 19, 1867 between the Sisseton and Wahpeton Bands of Sioux and the United States. (See Appendix at 1 for the full text of the Treaty.) Article III "...agreed that there shall be set apart for the members of said bands...the following described lands as a *permanent* reservation." (Emphasis added). Article 10 of the Treaty recognized the sovereign power of the Sisseton and Wahpeton Bands "to make their own laws and be ruled by them." *Williams v. Lee,* 358 U.S. at 220.

> The chiefs and headmen ... are authorized to adopt such rules, regulations, or laws for the security of life and property, the advancement of civilization, and the agricultural prosperity of the members of said bands ... and shall have authority ... to organize a force sufficient to carry out all such rules, regulations, or laws, and all rules and regulations for the government of said Indians, as may be prescribed by the Interior Department.

In keeping with the Tribe's status as a "domestic dependent nation," the Interior Department was enjoined to supervise this self-government.

The treatymaking period was closed by Act of March 3, 1871, 16 Stat. 566, 25 U.S.C. §71. An amendment to the 1867 Treaty, whereby the Sisseton and Wahpeton Bands agreed to "cede, sell, and relinquish to the United States all their right, title, and interest in and to all lands

and territory" described in the Treaty, with the exception of the land "expressly reserved as permanent reservations" in the 1867 Treaty, was accepted by the Bands on May 2, 1873 and adopted by the Act of June 24, 1874, 18 Stat. 167. The preamble to the Act states that the land "shall be ceded *absolutely* to the United States." (Emphasis added). On its face, the Act, by absolute cession expressly extinguishes the title of the Sisseton and Wahpeton Bands to particularly described lands.

The only other Act of Congress that contains provisions relative to the boundaries and size of the Lake Traverse Reservation is the Act of March 3, 1891, *supra.* ratifying an Agreement of December 12, 1889 between three United States commissioners and the chiefs, headmen, and male adult members of the Sisseton and Wahpeton Bands. (Appendix at 7 contains the full text of the Act.) The Bands agreed to open their permanent reservation for settlement. The only express language of Congress pertinent to the question of disestablishment or diminishment of the Reservation is found in § 26 (reciting Article I of the 1889 Agreement) and § 30.

> *Section 26.* ...The Sisseton and Wahpeton bands of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said bands of Indians...
>
> *Section 30.* That the lands by said agreement ceded, sold, relinquished and conveyed to the United States shall immediately, upon the payment to the parties entitled thereto of their share of the funds made immediately available by this act, and upon completion of the allotments provided for in said agreement, be subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located...

A conclusion that these sections disestablish the permanent Lake Traverse Reservation, as described in Article III of the 1867 Treaty, or separate any tracts therefrom is untenable. No act of Congress has ever changed the 1867 Treaty boundaries. That boundaries of reservations are changed by Congress only by "unequivocal" specific description of the lands excluded from the reservation and specific delineation of the new boundaries is the explicit meaning of *Celestine, supra,* and is evident from examination of the many contemporaneous acts which opened Indian reservations for settlement,[6] including the Act of March 3, 1891,

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[6]These Acts include the Act March 2, 1889, c.405, 25 Stat. 888 dividing a portion of the Great Reservation of the Sioux into six separate reservations and opening the remainder to settlement, and those opening to settlement the reservations of the Citizen Band of Pottawatomie, Act of March 3, 1891, c.543, 26 Stat. 1016; Cheyenne and Arapahoe, Act of March 3, 1891, c.543, 26 Stat. 1022; Coeur d'Alene, Act of March 3, 1891, c.543, 26 Stat. 1026; Gros Ventres, Mandans and Arickarees of the Fort Berthold Reservation, Act of March 3, 1891, c.543, 26 Stat. 1032; Crow, Act of March 3, 1891, c.543 26 Stat. 1039; Cherokee, Act of March 3, 1893, c.209, 27 Stat. 604; Tonkawa, Act of March 3, 1893, c.209, 27 Stat. 643; Pawnee, Act of March 3, 1893, c.209, 27 Stat. 644; Coeur d'Alene, Act of August 15, 1894, c.290, 28

[footnote continued]

opening Lake Traverse and six other reservations. *Mattz v. Arnett, supra,* 412 U.S. at 504, fn. 22; *United States ex rel. Feather v. Erickson, supra,* 489 F.2d at 101-102. Significantly, of the seven reservations opened for settlement by the Act of March 3, 1891,[7] the portions of land excluded from the reservation and the new boundaries resulting therefrom are specifically delineated by definite property lines for all but Lake Traverse. [8]

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Stat. 322; Nez Perce, Act of August 15, 1894, c.290, 28 Stat. 326; Yuma, Act of August 15, 1894,c. 290,28 Stat. 332; Shoshone and Bannock, Act of June 6, 1900. c.813, 31 Stat. 672; and Comanche, Kiowa and Apache, Act of June 6, 1900, c.813, 31 Stat. 676. The Act of March 3, 1891, which opened six of the reservations cited, also opened the Lake Traverse Reservation.

[7] Id. Those reservations occupied by the Citizen Band of Pottawatomie; Absentee Shawnee; Cheyenne and Arapahoe; Coeur d'Alene; Gros Ventres, Mandans and Arickarees; Sisseton and Wahpeton; and Crow were opened for settlement.

[8] In fact, in a letter dated August 13, 1889, the Comissioner of Indian Affairs instructed the Commissioners sent to negotiate with the Sisseton and Wahpeton Bands to state in the agreement the location of surplus lands to be sold, "which should be described by sections, or other legal subdivisions of townships." National Archives Records of the Bureau of Indian Affairs, Letters Sent: Land Division Letter Book 188. (See Appendix at 41 for the full text of this letter). After negotiating with the Bands, the Commissioners did not include legal land descriptions in the agreement, an indication that the boundaries of the reservation would remain unchanged.

1. The purpose, surrounding circumstances and the legislative history of the 1891 Act are inconsistent with an intent to disestablish or diminish the reservation.

The bill that became the 1891 Act was drafted from an agreement negotiated by three Indian Commissioners at five council meetings of the Sisseton and Wahpeton Bands held from November 30 - December 13, 1889. Of the 337 adult male members of the Bands over the age 18, between 200 and 300 attended the council sessions at a time when the Bands were very poor and hungry, due to three successive crop failures, and faced with a winter of severe cold and high winds. In order to survive,[9] the Bands were forced to enter into an agreement opening some of their lands for settlement. A report of the council proceedings was prepared by the commissioners. See, S. Ex. Doc. No. 66, 51st Cong., 1st Sess. (1890) for the full report and a transcript of the council sessions. An explanation of the bill was included in the report. Non-Indians in the areas surrounding the reservation were insistent that the reservation be opened.[10] General

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[9] An 1890 letter (Appendix at 54) from South Dakota's Governor A.C. Mellette to the Secretary of the Interior describes the destitute condition of the Bands. National Archives Records of the Bureau of Indian Affairs, Letters Received: Special Case 147, Letter No. 39462.

[10] One of the most insistent supporters of the reservation opening was D.W. Diggs, Banker, Bank of Milbank, South Dakota, who ultimately became one of the commissioners sent to negotiate the opening with the Sisseton and Wahpeton Bands. Diggs' main concern was the barrier that the reservation was posing to the development of local resources, in particular the completion of two or three railroad lines. National Archives Records of the Bureau of

[footnote continued]

Whittlesey, Secretary of the Board of Indian Commissioners and chairman of the commission[11] sent to Sisseton, stated:

> This reservation will be quickly settled by whites, bringing the arts of civilization, establishing schools in every township, so that you can send your children to school.... Another advantage is that the whites will exchange work with you. This will enable you to cultivate 50 acres where you now cultivate 10. There are other advantages which I have not mentioned. One is you will have towns and railroads and good markets near you. All this will make your lands more valuable... You hitch the two together and the white man and the Indian will pull together. S.Ex. Doc. No. 66, *supra* at 24.

The discussion leading to the 1889 agreement compels rejection of any suggestion that the proposed law would disestablish the reservation. That factor was not the topic of discussion because extinguishment of the reservation status was not part of the proposed legislation.

The legislative history establishes that the dominating purpose of the 1891 Act was to make surplus lands available to settlers in the hope that non-Indian neighbors

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Indian Affairs, Letters Received: Special Case 147, Letter No. 26163, encls. 2 and 3. (App. at 51) See *Mattz v. Arnett, supra*, 412 U.S. at 500. Diggs' local interests suggest the possibility of an allegiance extraneous to the mandated goals of the commission. His conduct and that of the commission as a whole must be "judged by the most exacting fiduciary standards." *Seminole Nation v. United States, supra*, 316 U.S. at 297.

[11] In addition to Whittlesey and Diggs, the commission included Charles A. Maxwell, Chief of the Land Division, Office of Indian Affairs.

would contribute to the Indians' opportunities to learn. The 1891 Act was designed to intermix non-Indians with Indian allottees in aid of the contemporaneous Federal policy of assimilation. *Mattz v. Arnett, supra*, 412 U.S. at 496. Thus, on the floor of the House, during the debate on the bill that became the 1891 Act, Congressman Gifford of South Dakota stated, 21 Cong. Rec. 6195; 51st Cong., 1st Sess. (1890).

> This Indian problem is by no means solved as yet. The question is not settled. The Indian is not yet a civilized being, but he is becoming civilized rapidly. All of these tribes of Indians that to-day feel the influences of the settlements in their vicinity are becoming civilized and self-supporting rapidly.[12]

Congressman Gifford vigorously supported maintenance of United States guardianship over Indians.[13]

[12] This remark was not made with specific reference to the Lake Traverse Reservation portion of the 1891 Act. Although the bill that became the 1891 Act was not introduced by Congressman Gifford, the sections pertaining to the Lake Traverse Reservation were incorporations of earlier bills introduced by him.

[13] In holding that the lands and personal property of members of the Sisseton and Wahpeton Bands residing on trust allotments were not subject to state or local taxation, the Court noted: "These Indians are yet wards of the Nation, in a condition of pupilage or dependency, and have not been discharged from that condition." Taxation would defeat the national policy of preparing Indians for civilized life and citizenship. *United States v. Rickert*, 188 U.S. 432, 437 (1903). The Sisseton and Wahpeton Sioux community is dependent and, therefore, not subject to the jurisdiction of the State. 18 U.S.C. §1151 (b).

The committee reports do not express any intent to dissolve the Reservation.[14] These reports, as well as reports on earlier Lake Traverse Reservation opening-for-settlement bills that failed to become law,[15] manifest a primary concern to alleviate the destitution and suffering of the Sisseton and Wahpeton Bands by relief owed them "as a matter of right." H. Ex. Doc. No.100; 5lst Cong., 2d Sess. (1890). The relief involved correcting a "monstrous injustice towards these loyal Sioux," S. Rep. No. 661; 5lst Cong., lst Sess. (1890); H.R. Rep. No. 1356; 51st Cong., lst Sess. (1890), by making restitution and payment of annuity moneys withheld since 1862. The annuities were part of the Treaty of July 23, 1851, 10 Stat. 49, and the Act of August 30, 1862, 10 Stat. 52. However, they were withheld on the mistaken assumption that the Sisseton and Wahpeton Bands had participated in the Sioux outbreak of August 6, 1862.

> But so far from violating their treaty obligations in respect of peaceableness and friendship towards the whites, they voluntarily aided in suppressing the revolt and in rescuing the white women and children who had been taken captives by the hostile Indians, and enrolled themselves as scouts and soldiers, rendering meritorious service in the armies of the United States, guarding the frontier against the incursions of hostile Indians, and imperiled their lives in other fields of service during the civil war. S. Rep. No. 661; 51st Cong., 1st Sess. (1890).

[14] S. Rep. No. 1510; 51st Cong., 1st Sess. (1890); H.R. Rep. No. 2325; 51st Cong., 1st Sess. (1890).

[15] S. Rep. No. 661; 51st Cong., 1st Sess. (1890); H.R. Rep. No. 2271; 51st Cong., 1st Sess. (1890). These reports, on bills almost identical to that which became law, also do not refer to the Lake Traverse Reservation in a way evidencing an intent to disestablish or diminish it.

It was for this reason only that a grateful nation set aside a permanent reservation for the Sisseton and Wahpeton Bands in 1867. Preamble, Treaty of February 19, 1867, 15 Stat. 505. The Sisseton and Wahpeton Bands having fulfilled their treaty obligations, the committee report, *Id.*, and Section 27 of the 1891 Act proclaim the intention of the United States to honor its treaty obligations. It is inconceivable that the United States, out of gratitude, would make such a sincere commitment only to obliterate its value by disestablishing or diminishing the reservation. The only way in which the restitution provided by the United States could have any real meaning was if the reservation continued to exist.

As in *Seymour v. Superintendent, supra*, 368 U.S. at 356, the 1891 Act "did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards." See also, *Mattz v. Arnett, supra*, 412 U.S. at 497.

2. The language of the 1891 Act rejects disestablishment or diminishment of the reservation.

The construction of the 1891 Act probably does not require invocation of "the general rule that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Alaska Pacific Fisheries v. United States, supra*, 248 U.S. at 79. No language in the 1891 Act expressly dis-

establishes or diminishes the reservation nor is such a consequence clear from the surrounding circumstances and legislative history.

Section 26, incorporating and ratifying the 1889 Agreement, states that the Sisseton and Wahpeton Bands sell "all the unallotted land *within the limits of the reservation*[16] "...remaining after the allottments and additional allottments..." (Emphasis added).

Section 27 specifies that the proceeds of the sale be deposited in the Treasury to the credit of the Indians, to be appropriated by Congress for their education and civilization. This language is a reflection of the assimilationist purposes of the Act and expresses an intent not to terminate the reservation. *Mattz v. Arnett*, *supra*, 412 U.S. at 504. Section 28 withholds from sale to settlers, lands occupied by religious societies and other organizations and Section 30 withholds from sale to settlers, lands for schools, all indicia contrary to disestablishment or diminishment of the reservation. These are acts of a guardian and trustee considered beneficial to the development of its wards. Section 29 authorizes additional allotments to equalize allotments among the members of the Bands. The additional allotments could be taken anywhere within the reservation, indicating that the reservation is not to be disestablished or diminished.

The 1891 Act also omits provision for a survey of the reservation. This suggests a lack of intent to separate the opened lands from the reservation and mark new boundaries. The portion of the 1891 Act that established the

[16] The Secretary of the Interior describes "ceded land, lying within the Sisseton and Wahpeton Indian Reservation, known as Lake Traverse Reservation..." In the matter of *Edward Parant*, 20 L.D. 53, 54 (1895).

boundaries of the present Fort Berthold Reservation (§§ 23-25) immediately preceded the Lake Traverse Reservation sections and provided for a survey of the outboundaries of the diminished reservation. 26 Stat. at 1032. If Congress intended to diminish or disestablish the Lake Traverse Reservation it is likely that the Fort Berthold method would have been used.

The two "whereas" clauses of the 1889 Agreement, Section 26 of the 1891 Act, also refute any intent to disestablish or diminish the reservation. The first clause recites Section 5 of the Act of February 8, 1887, c.119, 24 Stat. 388, known as the General Allotment Act, authorizing the Secretary of the Interior to negotiate with tribes for the purchase and release of lands remaining after allotments. The second clause states that the Sisseton and Wahpeton Bands "are desirous of disposing of a portion of the land set apart and reserved to them" by the 1867 Treaty. These clauses clearly underscore the intent of the Indians[17] and of Congress to dispose of the unallotted lands and nothing more. The reservation is not disestablished or diminished, new boundaries are not set, and no portion of it is restored to the public domain. When Congress disestablishes or diminishes reservations, the deleted areas and the remaining areas are specifically

[17] During 1905 and 1906, a number of the original allottees among the Sisseton and Wahpeton Sioux applied to the Commissioner of Indian Affairs for fee patents to their lands "on the Lake Traverse Reservation." That all of these original allottees contemplated the continued existence of the Lake Traverse Reservation is evident from a representative letter of Josaphine La Framboise reprinted in Appendix at 46. National Archives Records of the Bureau of Indian Affairs, Letters Received: Special Case 147, Letter No. 11658.

described and the former are specifically restored to the public domain. Congress "uses clear language of express termination" to disestablish or diminish a reservation and restore it to the public domain "when that result is desired." *Mattz v. Arnett, supra,* 412 U.S. at fn. 22. Thus, from 1889 to 1908, when many of the opening for settlement acts were passed, Congress used variations of four different formulas (or combinations of them) to disestablish or diminish reservations: (1) land is "vacated and restored to the public domain" (See fn. 6, *infra,* Great Reservation of the Sioux; Coeur d'Alene (1891); Cherokee; Tonkawa; Pawnee; Coeur d'Alene (1894); and Shoshone and Bannock); (2) tribes "cede, relinquish, and surrender forever and absolutely, without any reservation express or implied, all title, claim and interest of every kind and character" (See fn. 6, *infra,* Citizen Band of Pottawatomie; Absentee Shawnee; Cheyenne and Arapahoe; Tonkawa; Pawnee; and Comanche, Kiowa and Apache); (3) tribes make a "full and complete relinquishment and extinguishment of all their title, claim and interest" (See fn. 6, *infra,* Cherokee); and (4) provision is made for "segregating the ceded land from the diminished [or 'reduced'] reservation" (See fn. 6, *infra,* Coeur d'Alene (1894) and Shoshone and Bannock.)

Formula (2) above was preferred by Congress in 1891 and was used in the opening of three reservations in the very Act that opened the Lake Traverse Reservation. The failure to use such unequivocal language in the Lake Traverse provisions can only be regarded as an intent not to disestablish or diminish the reservation.

> Where, as here, the Indians merely sold the unallotted lands within the limits of the Reservation set apart by treaty, which remained after allotments to the Indians, and where the unallotted lands are scattered throughout such treaty Reservation, *in the absence of clear and specific language,* there is no basis to hold that any particular area was excluded or that the Reservation was diminished to any extent. (Emphasis added). *Boundaries of Lake Traverse Indian Reservation,* Field Solicitor's Opinion, Aberdeen Office, Bureau of Indian Affairs, August 16, 1972. Appendix at 29.

The first "whereas" clause stipulates that the negotiations with the tribe must be "in conformity with the treaty or statute under which such reservation is held." The reservation is held pursuant to the 1867 Treaty. The most important benefit of the Treaty was the Indians' right to a defined and secure permanent reservation. It was the right to that reservation so defined and secured that was expressly preserved to the Sisseton and Wahpeton Bands by the stipulation in the opening "whereas" clause, Section 26, of the 1891 Act. To disestablish or diminish the reservation is to read that benefit out of the statute. The 1891 Act will not withstand such a construction.

The Eighth Circuit deemed similar language supporting continued entitlements to treaty benefits significant in construing the Acts of June 1, 1910, c.264, 36 Stat. 455 and May 29, 1908, c.218, 35 Stat. 460, "surplus" land statutes opening for settlement by non-Indians portions of the original Fort Berthold and Cheyenne River Reservations respectively. *City of New Town, N.D. v. United States, supra,* and *United States ex rel. Condon v. Erickson, supra,* respectively. Indians in the municipalities of New Town, North Dakota (Fort Berthold Reservation) and Eagle Butte, South Dakota (Cheyenne River Reservation) were held by the Eighth Circuit not to

be subject to the jurisdiction of the States involved, although each town is located on the opened portion of its reservation.

No such treaty conformity provision is found in the Act of March 22, 1906, c.1126, 34 Stat. 80 (Colville) or the Act of June 17, 1892, c.120, 27 Stat. 52 (Hoopa Valley). These acts opened for settlement reservations created by Executive Order. Despite this, the Court in *Seymour* and *Mattz* respectively held that these acts did not diminish either reservation.

Another treaty right intimately related to the right to a defined and secure reservation is the right to self-government and its corollary, freedom from state jurisdiction.

> The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.
>
> *McClanahan v. State Tax Commission of Arizona, supra,* 411 U.S. at 168. See also, *Rice v. Olson,* 324 U.S. 786, 789 (1945); *Worcester v. Georgia,* 31 U.S. at 557; *United States ex rel. Feather v. Erickson, supra,* 489 F.2d at 101; *United States ex rel. Condon v. Erickson, supra,* 478 F.2d at 689.

A Tribe retains an internal sovereignty, its powers of local self-government, which are "subject to qualification by treaties and by express legislation of Congress." Cohen, *Handbook of Federal Indian Law,* 398 (G.P.O. 1945).[18] See also, *McClanahan v. State Tax Commission of Arizona, supra,* 411 U.S. at 168-171; *Williams v. Lee,*

[18] The United States Supreme Court described Cohen as "an acknowledged expert in Indian law." *Squire v. Capoeman,* 351 U.S. 1, 8-9 (1956).

supra, 358 U.S. at 220-222; *Talton v. Mayes,* 163 U.S. 376 (1896); *Littell v. Nakai,* 344 F.2d 486 (CA9 1965), cert. den. 382 U.S. 986 (1965); *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation, supra. New Town* expanded on the principle of internal sovereignty.

> The right to have the reservation boundaries remain undiminished carries with it many important subsidiary rights, among them the right for unemancipated Indians to be subject only to federal and tribal jurisdiction. The 1910 Act specifically recognized that the opening of the reservation for homesteading was not intended to deprive the Indians of any rights not inconsistent with the Act, and as *Seymour* established, homesteading is not inconsistent with the maintenance of the original reservation boundaries. The 1910 Act clearly by its own terms does not purport to alter the reservation boundaries. 454 F.2d at 125.

The same is true of the 1891 Act in the case at bar. Treaty rights are incorporated into the Act, settlement is not incosistent with the continued existence of the reservation, and the Act does not expressly alter reservation boundaries. The only language in the 1891 Act that can be interpreted as an express qualification of the internal sovereignty of the Sisseton-Wahpeton Sioux is contained in Section 30. The phrase "and be subject to the laws of the State wherein located" has been construed by the Court below to disestablish or diminish the reservation and subject all of the lands opened for settlement to state jurisdiction. Such a construction not only is controverted by *Feather, Mattz, Seymour, New Town,* and *Condon,* it fails to apply applicable rules of statutory construction mandating that "as between the

Whites and the Indians, the laws are to be construed most favorably to the latter," *Red Bird v. United States, supra,* 203 U.S. at 94, and ignores the consistent solicitude of the United States toward the sovereignty of these Indians. Article X of the 1867 Treaty not only failed to impose an express qualification on tribal internal sovereighty, it expressly recognized tribal authority "...to adopt such rules, regulations, or laws for the security of life and property...." as needed. The Commissioners sent to negotiate with the Indians in 1889 were meticulous in their respect for the tribal chiefs and council as the tribal decision makers. They were also careful to draw the Agreement as the Indians prescribed, including restoration of prior treaty rights. Nowhere is state jurisdiction mentioned. See the report and transcript of the council proceedings contained in S. Ex. Doc. No. 66, *supra.* It is not possible that the tribe would vigorously fight for prior treaty rights abrogated, and relinquish a most important existing treaty right, freedom from state jurisdiction. Jurisdiction over domestic relations, especially control over the custody of its children, at issue in the case at bar, touches the essence of the tribal relation. The Tribe did not and would not voluntarily relinquish such jurisdiction.

The 1891 Act, approving the 1889 Agreement, states that Congress passed the legislation with the consent of the Indians. Since 1891, the United States has consistently recognized the internal sovereignty of the Sisseton-Wahpeton Sioux by treating its tribal organization, which operates from Sisseton, a town the decision of the Court below excludes from the reservation, as a unit of local self-government for the appropriation of governmental funds. The South Dakota

Supreme Court has found nothing in the 1891 Act "indicating an intention to dissolve the tribal government" of the Sisseton and Wahpeton Sioux but, contradicting this finding, has limited tribal jurisdiction to the "closed" portion of the reservation, *Application of DeMarrias,* 77 S.D. 294, 91 N.W.2d 480, 484 (1958), a stricture by which the tribe has not been bound. The tribal government is the primary provider of substantial governmental functions to the Indians on the Lake Traverse Reservation. Under a tribal code, it operates the only effective police force and court system; it is the primary provider of rental housing (240 units); it provides fire protection; it is the major employer; it operates the only garbage collection and disposal; and it provides numerous services to the non-Indian reservation population in the areas of housing, sanitation, health, transportation, education and law enforcement. In short, it is the major functioning governmental entity within the reservation boundaries.[19]

Since only a small percentage of the members of the tribe live on the "closed" reservation, the State assertion of its jurisdiction infringes substantially and without Congressional approval on the sovereign right of the tribe to make its own rules and be governed by them. *Williams v. Lee, supra.* The sovereign rights of a tribe are not dependent on the ownership of particular parcels of land. *Seymour v. Superintendent, supra.* In addition, the jurisdiction of the United States does not "depend upon the size of the particular areas which are held for Federal purposes. It must be remembered that the fundamental

[19] See 19 C.F.R. §51.2 (1) defining governments eligible for revenue sharing as including tribes which perform "substantial governmental functions." The Sisseton-Wahpeton Sioux have been found eligible.

consideration is the protection of a dependent people." *United States v. Pelican*, 232 U.S. 442, 449.[20] By the 1891 Act and regardless of its relinquishment language, Congress contemplated no more than it did in other surplus land statutes enacted from 1890-1910 held not to affect continued reservation existence.

Section 30 only makes the land reserved for schools subject to state laws. At most, it is proprietary in scope. *Establishment of Tribal Judicial System, Sisseton-Wahpeton Sioux Tribe*, Field Solicitor's Opinion, Aberdeen Office, Bureau of Indian Affairs, June 9, 1972. (App. at 21.) See, *Seymour v. Superintendent, supra.* This is the plain meaning of the language. *United States ex rel. Feather v. Erickson, supra*, 489 F.2d at 101-102. The 1889 Agreement did not contain the language in Section 30. The committee reports on the House bill that became the 1891 Act do not clarify the language. S. Rep. No. 1510; 51st Cong., 1st Sess. (1890); H.R. Rep. No. 2325; 51st Cong., 1st Sess. (1890). The only explanation of Section 30 in the legislative history appears in a committee report on an earlier House bill, virtually identical to the one that became the 1891 Act. H.R. Rep. No. 1356; 51st Cong., 1st Session (1890). The Report states: "We have further amended the bill providing for the purchases of the sixteenth and thirty-sixth second

[20] *United States v. Nice*, 241 U.S. 591 (1916), implies that allottees under the 1887 General Allotment Act are protected by Federal law even when they are involved in incidents which occur off of an allotment. The protection of Federal law extends to the person of the Indian allottee and is not dependent on the legal status of land. The locus of a particular act is not conclusive when the issue is intimately connected to the right of tribal self-government. *Littell v. Nakai, supra*, 344 F.2d at 490.

sections by the States wherein it is located...."[21] That the "subject to the laws of the State" clause in Section 30 had application to land sections 16 and 36 only,[22]

[21] Section 30 of the 1891 Act does not grant land sections 16 and 36 to South dakota nor does it provide for the purchase of these land sections by the State. It merely *reserves* these land sections for common school purposes and makes them subject to the laws of the State. "Subject to the laws of the State" should not necessarily be construed as equivalent to "subject to the jurisdiction of the State." Section 30 can be plausibly interpreted as continuing tribal jurisdiction over land sections 16 and 36, although the tribe is enjoined to apply the laws of the State. *United States v. Thomas*, 151 U.S. 577, 585 (1894), supports such a construction. The Court, recognizing the obligation of the United States as guardian to protect its Indian wards, held that the Federal court had jurisdiction over crimes committed by Indians on section 16, within the reservation but ceded to the state for school purposes.

[22] The correctness of this interpretation is underscored by the treatment of land sections 16 and 36 in other "surplus" land statutes passed between 1890 and 1910. Several statutes specifically *grant* sections 16 and 36 to the States. See, Act of March 3, 1891, c.543, 26 Stat. 1039 (Crow); Act of May 29, 1908, c.218, 35 Stat. 460 (Cheyenne River); and the Act of April 27, 1904, c.1620, 33 Stat. 319 (Devils Lake). Three statutes, Act of August 15, 1894, c.290, 28 Stat. 314 (Yankton Sioux) and 326 (Nez Perce); and the Act of June 6, 1900, c.813, 31 Stat. 672 (Shoshone and Bannock), used the same language as in Section 30 of the 1891 Act except that no comma was placed *before* the word "and," in the State law clause, clearly making the language apply to land sections 16 and 36 only. *United States ex rel. Feather v. Erickson, supra*, 489 F.2d at 101-102. Relying exclusively for authority on a case overruled by *Feather, DeMarrias v. State of South Dakota*, 206 F. Supp. 549 (D.S.D. 1962), aff'd 319 F.2d 845 (CA8 1963), the court below holds that Section 30 subjects all

[footnote continued]

since these were to be purchased by the State, is supported by November 13, 1918 correspondence between the Assistant Commissioner of Indian Affairs and Congressman Royal C. Johnson of South Dakota.

> An examination of the records of this Office shows that 32840.25 acres comprising sections 16 and 36 within the former[23] Lake Traverse Reservation in South Dakota, were reserved for common school purposes and made subject to the laws of the state wherein located. These lands were granted to the state for school purposes under the provisions of the Act of March 3, 1891 (26 Stat. 1036-1039), and this Department has no jurisdiction over said lands.
>
> National Archives Records of the Bureau of Indian Affairs, Central Classified File, 71887-1918-307 Sisseton.

Construing Section 30, the Eighth Circuit in *Feather, supra,* stated that "in light of the general pattern adopted by Congress in making specific grants of these numbered sections in each township to the state," the clause most plausibly subjected only school lands to the laws of the State. 489 F.2d at 101-102.

[footnote continued from preceding page]
lands opened to setttlement to the jurisdiction of the State. 211 N.W.2d at 846. The only intelligible meaning of Section 30's state law clause is that it modifies only the immediately preceding clause.

[23] This reference to the "former" reservation resulted from confusion between 1918 and 1920 on whether the "surplus" land statutes disestablished or diminished the reservation. *Seymour v. Superintendent, supra,* 368 U.S. at fn. 12. No Congressional act contains such a reference. "Former" may have been used as a shorthand indentification. *Mattz v. Arnett, supra,* 412 U.S. at 498.

The imposition of State law on an Indian tribe is a serious qualification of its internal sovereignty,[24] accomplished only by express statutory grant. *Kennerly v. District Court of Montana, supra; Williams v. Lee, supra; United States v. Celestine, supra.* In the absence of such a grant, assumption by the state of jurisdiction without tribal consent amounts to termination of tribal self-government in violation of 25 U.S.C. § 1326. To interpret the language of Section 30 as authorizing state jurisdiction is to lightly impute to Congress an intent to abrogate Indian rights. Nowhere does the express language of the 1891 Act or the legislative history and surrounding circumstances diminish the boundaries of the Lake Traverse Reservation. At best, the language supports maintenance of the 1867 Treaty boundaries. At worst, the language is ambiguous, necessitating construction in favor of the Indians. South Dakota has never acquired jurisdiction over Indians on the Lake Traverse Reservation.

B. Statutory failure to lessen federal trust responsibility for Indians on the Lake Traverse Reservation should be construed as an intent to maintain an undiminished reservation.

Since no lessening of federal trust responsibility, for the Sisseton and Wahpeton Bands or over their reservation lands, occurred under the Act of March 3,

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[24] Congress has been very specific in expressly qualifying internal tribal sovereignty by making Indians subject to particular State laws. Several surplus land statutes have applied the state laws of descent, Act of March 2, 1889; c. 405, 25 Stat. 888 (Great Sioux Reservation); Act of March 3, 1891, c.543, 26 Stat. 1032 (Fort Berthold); Act of August 15, 1894, c.290, 28 Stat. 332 (Yuma), and state laws on capital crimes, Act of March 3, 1891, *supra,* to the tribes.

1891. Congress did not intend that the Act would disestablish or diminish the Lake Traverse Reservation. The acts of those federal officers chiefly charged with discharging the federal responsibility toward the Sisseton and Wahpeton Sioux must be examined to determine if any lessening of this responsibility has occurred.

One of the prime federal responsibilities towards the Sisseton and Wahpeton Sioux is that of providing an agency through which innumerable federal services are rendered. The duty of maintaining an agency for the Sisseton and Wahpeton Sioux was first imposed by Article VII of the Treaty of February 19, 1867. The agency is situated in the townsite of Sisseton, a location which the court below maintains is no longer within the Reservation. From Sisseton the Bureau of Indian Affairs and various other federal agencies including the Departments of Health, Education and Welfare, Commerce, Treasury, Labor, Justice, Housing and Urban Development, Agriculture, and the Office of Economic Opportunity administer a large number of federal programs in the discharge of the federal responsibility to the Sisseton and Wahpeton Sioux. By financing the tribal police, court and other governmental functions, the Federal government has encouraged the Tribe's government to become stronger and more highly organized. *Williams v. Lee, supra,* 358 U.S. at 220. Rather than lessening, there has been a sharp and constant increase in federal responsibility since the 1891 Act. Significantly less than 50 percent of the 1867 Treaty permanent Reservation area is federal trust land. (Trial Exhibit No. 1, Single Appendix at 3.) However, federal programs and services to members of the Sisseton and Wahpeton Sioux Tribe have not been limited to those Indians on trust allotments, but are available to Indians

residing on the lands opened to settlement under the 1891 Act. [25]

The assertion is untenable that this increased federal activity on the reservation, including the opened area, is conducted from a site off the reservation. The actions of the various federal agencies clearly demonstrate that the federal officers and agencies primarily responsible for discharging the federal responsibilities to the Sisseton and Wahpeton Sioux have not let the 1891 Act reduce the scope of their duties. Therefore, to the extent that a lessening of federal responsibility is an indication that Congress intended the 1891 Act to disestablish or diminish the Lake Traverse Reservation, the Act is clearly contrary to such an intent. The federal trust responsibility is broad. It does not extend only to protection of the Indians' lands but to their complete protection and development. *United States v. Nice,* 241 U.S. 591, 599 (1916). The Federal Goverment has assumed a general duty to supervise, control and protect the Indians. The Government must fully protect Indian rights, "discharge faithfully its legal and moral obligations to them, and to execute every trust with which it is charged for their benefit." *United States v. Pearson,* 231 F. 270, 280 (D.S.D. 1916). The United States has carried out this trust by maintaining its jurisdiction over Indians. Just as state taxation of federal trust land is "the power to destroy, and the power to destroy may defeat and render useless the power to create," *Id.*, (See also, *United States, v. Rickert, supra),* state jurisdiction subverts the federal trusteeship and defeats national policies of guardianship

[25] *E.g.*, The entire Indian population within the 1867 reservation boundaries is counted in computing the current revenue-sharing allocation of the Tribe. Letter of Arthur L. Hauser, Manager, Data and Demography Unit, Office of Revenue Sharing, Office of the Secretary of the Treasury, Washington, D.C. to Moses D. Gill, Chairman, Sisseton-Wahpeton Sioux Tribe, April 25, 1973. See Appendix at 47.

and self-determination. The South Dakota Supreme Court cannot divest the Federal Goverment of its exclusive and supreme power over Indian affairs.

C. Subsequent enactments of Congress recognizing the continued existence of the Reservation support the construction that the 1891 Act did not diminish the reservation.

Few statutes have been enacted relating to the Sisseton and Wahpeton Sioux of the Lake Traverse Reservation. Since the 1891 Act, Congress has consistently recognized the continued existence and status of the subject area as a Federal Indian reservation and has acted on the assumption that no state jurisdiction existed within the boundaries of the 1867 Treaty reservation. Both before and ever since the 1891 Act, Congress has appropriated funds to maintain a reservation agency and staff, to administer to the health, welfare and safety of Indians on the reservation. The United States has provided for roads, education and other services. It supports a tribal government to make and enforce laws within the exterior boundaries of the reservation. Legislative treatment by way of repeated annual appropriations of Federal money to support a tribe on a reservation is in unexplainable conflict with a construction that by the 1891 Act, Congress intended to disestablish the reservation.

In Section 5 of the General Allotment Act of February 8, 1887, c.119, 24 Stat. 388, 389 as amended, Act of June 21, 1906, 34 Stat. 325, 326, Congress provided a 25-year trust period on allotments within the geographic boundaries of any Indian reservation. The President was given discretionary authority to extend this period. The period of trust was extended to trust allotments on reservation lands affected by surplus land acts.[26] See

[26] From the holding of the court below, it can be inferred that allotments and the opening for settlement of lands surplus to allotments under the General Allotment Act removed the patented

[footnote continued]

Putnam v. United States, 248 F.2d 292, 295 (CA8 1957). The reservation could not be abolished until the trust expired. *Mattz v. Arnett, supra*, 412 U.S. at 496.

The 1891 Act, pursuant to the General Allotment Act, established a 25-year trust period on allotments throughout the Lake Traverse Reservation. This period was extended on all allotments throughout the Lake Traverse Reservation by Presidential Executive Orders 1916, April 16, 1914 (10-year extension) and 3994, April 19, 1924 (15-year extension) both specifically referring to the "Sisseton and Wahpeton Bands of Sioux Indians of the Lake Traverse Reservation, North and South Dakota." Thereafter, the trust period has been continually extended on all allotments throughout the Lake Traverse Reservation by a general Executive Order (E.O. 7984, October 7, 1938 - 25-year extension) and by delegated authority orders of the Secretary of the Interior (28 F.R.

[footnote continued from preceding page]

lands from Indian Country, thereby placing them under state jurisdiction. In discussing the effect of the General Allotment Act, this Court recently observed that allotment under the Act did not accomplish reservation termination. *Mattz v. Arnett, supra*, 412 U.S. at 496-497. This is even more true when the Act is read together with 18 U.S.C. §1151 and the surplus land statute does not contain clear termination language. *Id.* at 504. *Accord, United States v. Nice, supra*, 241 U.S. at 597, 599-600; *United States v. Pelican, supra*, 232 U.S. at 450-451. *Farrell v. United States*, 110 F. 942, 950-951 (CA 8 1901) (Lake Traverse Reservation); and *Jurisdiction of the State of South Dakota to Prosecute Indians for Violations of the State Game Laws on Allotted Lands Within the Boundaries of the Sisseton Reservation*, 58 I.D. 455 (1943), holding that unalloted Indians, allotted Indians who acquired allotments through devise or inheritance from the original allottees, and allottees who received their allotments after the Act of May 8, 1906, c. 2348, 34 Stat. 182, were not subject to the criminal and civil laws of the states.

11630, October 31, 1963 - 5-year extension; 33 F.R. 15067, October 9, 1968 - 5-year extension; and 38 F.R. 34463 - 34464, December 7, 1973 – 5-year extension until January 1, 1979).[27]

In 1972, Congress appropriated monies for the Sisseton and Wahpeton Bands pursuant to the claims award of the Indian Claims Commission. Act of October 25, 1972; 86 Stat. 1168. The Tribe received approximately one-third in a lump sum, the remainder disbursed per capita.

Implicit in all of these enactments and orders is repeated recognition by Congress and by the Department of the Interior of the sovereignty, within the boundaries of an undiminished federal Indian reservation, and tribal organization of the Sisseton-Wahpeton Sioux.[28] *Mattz v. Arnett, supra,* 412 U.S. at 505, fn. 17. No act subsequent to 1891 ever described the "former" Lake Traverse Reservation as in *Seymour v. Superintendent, supra,* 368 U.S. at fn. 12; and *United States ex rel. Condon v. Erickson, supra,* 478 F.2d at 688.

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[27] All trust extensions are pursuant to the Acts of February 8, 1887, 24 Stat. 388, 389; June 21, 1906, 34 Stat. 325, 326; and March 2, 1917, 39 Stat. 969, 976. The Secretary of the Interior was authorized to extend trust periods by E.O. 10250, June 5, 1951.

[28] Introduced by South Dakota's two Senators and Rep. Frank Denholm (S.D.), pending federal legislation approving Sisseton-Wahpeton Sioux Tribe land acquisition (S.1411, H.R. 8230, 93d Cong., 1st Sess.) and restoring to tribal ownership certain vacant and ceded lands formerly used for school and agency purposes (S. 1412, H.R. 8229, 93d Cong., 1st Sess.) clearly indicates that the present Lake Traverse Reservation boundaries are coextensive with the 1867 boundaries.

D. Construction and treatment of the 1891 Act by the Department of the Interior has consistently supported the continued existence of the 1867 treaty reservation.

The courts give "great weight" to the construction and interpretation of a statute by an agency responsible for its administration. Such construction "is not to be overturned unless clearly wrong...." *United States v. Jackson,* 280 U.S. 183, 193 (1930). See also, *Zemel v. Rusk,* 381 U.S. 1, 85 (1965); *Udall v. Tallman,* 380 U.S.1, 16-17 (1965); *Stevens v. Commissioner,* 452 F.2d 741, 746 (CA9 1971); *Farrell v. United States, supra,* 110 F. at 951. Here the Department of the Interior charged with responsibility for Indian Affairs, has consistently recognized and administered the entire reservation including the area opened by the 1891 Act, as an Indian reservation.

On March 22, 1892, the Commissioner of Indian Affairs issued a Circular on "Sisseton and Wahpeton Lands," 14 I.D. 302, in which he discusses the

> proclamation to be hereafter issued by the President, opening to settlement and entry the unallotted lands embraced *within the limits* of the Sisseton and Wahpeton (Lake Traverse) Indian reservation, in the State of North Dakota and South Dakota....(Emphasis added).

The Commissioner also mentions the "boundary line between the States of North and South Dakota across the Lake Traverse reservation."

President Benjamin Harrison issued a Proclamation on April 11, 1892 prescribing the mechanism by which the surplus and unallotted lands opened by the 1891 Act

would be made available to homesteaders. That the President, as the chief executive of the United States, the ultimate guardian of the Sisseton and Wahpeton Sioux, contemplated an undiminished reservation is clearly indicated by the terms of the Proclamation. 27 Stat. 1017. See Appendix at 16 for the full text.

> ...I, Benjamin Harrison, President of the United States, do hereby declare and make known that all of the lands *embraced in said reservation*, saving and excepting the lands reserved for and allotted to said Indians . . . . [will] be opened to settlement . . . . (Emphasis added).

The lands opened to settlement were particularly described in an attached "schedule of lands *within the Lake Traverse Reservation....*" (Emphasis added). The President then gave notice of his order "that the lands mentioned and included in this Proclamation shall be, and the same are attached to the Fargo and Watertown land districts." There follows a detailed description of the land included in each land district. Each description begins: "All that *portion of the Lake Traverse Reservation.....*" (emphasis added) and contains specific reference to the north, east and west boundary lines of the Reservation, as well as, "the northeast corner of the Lake Traverse Indian Reservation," indicating that the Reservation boundaries remain as established by Article III of the Treaty of 1867. [29]

The President also warned that until the official opening no entry was to be made upon the reservation lands except by the Indians. Surely, if the lands had been excluded from the Reservation, the Indians would have no greater right of entry than others.

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[29] The Reservation is triangular and does not have a southern boundary line.

Two decisions of the Department of the Interior reversing, on appeal, rulings by the Commissioner of the General Land Office denying entry to non-Indians seeking homesteads on the lands opened for settlement by the 1891 Act, expressly state the contemporaneous understanding that the Act did not disestablish or diminish the reservation.

In the matter of *Madella O. Wilson*, decided on August 10, 1893, the First Assistant Secretary of the Interior refers to the land in question as "in the Sisseton and Wahpeton Indian reservation," 17 L.D. 153.

In the matter of *Edward Parant*, decided on January 21, 1895, the Secretary of the Interior decided that Parant is not "disqualified to take a homestead in the Lake Traverse reservation." The land is described as "ceded land, lying within the Sisseton and Wahpeton Indian reservation, known as Lake Traverse reservation....," 20 L.D. 53.

The United States Indian Agent at Sisseton, in his annual report to the Commissioner in 1895 described the Lake Traverse "Reservation forming the northeastern corner of the State... comprising 918,780 acres of land." *Annual Report*, Commissioner of Indian Affairs, United States Indian Affairs Office, 301 (1894/1895). This language cannot be more explicit that the reservation is undiminished, since the 1867 treaty reservation contained 918,780 acres. Again in 1900, the Sisseton Indian Agent described an undiminished reservation:

> The reservation is in the northeastern part of South Dakota, occupying parts of Roberts, Day, Grant, Marshall and Codington counties, and extending into Richland and Sargent counties of North Dakota. It is about 120 miles long and at the State line 42 miles wide, coming to a point near Watertown, S. Dak....

> There are 1970 [allotted] pieces of land situated from one end of the reservation to the other . . . .
>
> *Annual Report*, Commissioner of Indian Affairs, United States Indian Affairs Office, 385 (1900)

These early interpretations of the 1891 Act should be given great weight in ascertaining Congressional intent.[30]

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[30] The Annual Reports of the Commissioner of Indian Affairs contemporaneous with the 1891 Act repeatedly mention the Lake Traverse Reservation in the context of its continued existence. See the *Annual Reports* for the years 1892 at 64, 67, 81; 1893 at 13, 23, 592, 607; 1894 at 19, 495; 1895 at 301, 482-483, 487; 1896 at 301, 492-493; 1897 at 442-443; 1898 at 578; 1899 at 542, 1900 at 384, 614-615; and 1909 at 138. The *Annual Reports* are well supplemented by correspondence between various officials of the Department of the Interior. Thus on November 10, 1891, a United States Special Allotting Agent wrote to the Commissioner of Indian Affairs concerning the "south point of the Lake Traverse Reservation" and mentioning surveys "within the Lake Traverse Reservation." Field notes showing an undiminished reservation were enclosed. National Archives Records of the Bureau of Indian Affairs, Letters Received: Special Case 147, Letter No. 40984. On October 30, 1892, the United States Indian Agent at Sisseton, in a letter to the Commissioner of Indian Affairs described lands "on the Lake Traverse Reservation" and included a map of the reservation labeled "Sisseton Indian Reservation" that clearly shows an undiminished reservation. *Id.* at Letter No. 39820. An Acting Secretary of the Interior, in an October 1, 1902 letter to the Commissioner of Indian Affairs, refers to an allotment "on the Sisseton reservation." *Id.* at Letter No. 58456. Writing to the Commissioner of Indian Affairs on April 22, 1904, the Secretary of the Interior discusses the cancellation of an allotment "on the Sisseton reservation." *Id.* at Letter No. 27212. In a letter of January 25, 1906, to the Commissioner of Indian Affairs, the

[footnote continued]

In a letter of the First Assistant Secretary of the Interior, dated June 27, 1935, reference is made to Drywood Lake as lying "wholly within the boundaries of the Sisseton Indian Reservation." National Archives Records of the Bureau of Indian Affairs, Central Classified Files, 49766-1934-313 Sisseton. The full text is in the Appendix at 48. Drywood Lake is part of the area opened to settlement under the 1891 Act.

A map of the Sisseton-Wahpeton Indian Reservation, South Dakota, 1936, Department of the Interior, Office of Indian Affairs, Emergency Conservation Project No. 17 (Exhibit No. 1, Single Appendix at 3.), confirms that the Department of Interior recognized that the lands within the limits of the 1867 Treaty boundaries formed the Lake Traverse Reservation in 1936. This map continues to be used by the Bureau of Indian Affairs as an accurate representation of the Reservation in 1974.[31]

[footnote continued from preceding page]

United States Indian Agent at Sisseton recommended against the issuance of a fee patent to an allotment "on this reservation." *Id.* at Letter No. 11658. All of the above-referenced letters, a sampling of similar Archives materials, are set out in full in Appendix at 35-40, 43-46, 51-54.

[31] The cartographic record is not entirely clear. Although the textual materials contained in the contemporaneous *Annual Reports* of the Commissioner of Indian Affairs, *Id.*, consistently treat the Lake Traverse Reservation as undiminished, beginning in 1892 the maps of Indian reservations accompanying the *Annual Reports* did not show the Lake Traverse Reservation. The Reservation first reappeared in these maps in 1909 and was described as an "open" reservation. Since 1908, Department of the Interior maps have depicted the Lake Traverse Reservation. The most recent such map supports federal reservation status of the Lake Traverse Reservation. Map of Indian Lands and Related

[footnote continued]

The Commissioner of Indian Affairs also contemplated no reduction in the size of the Lake Traverse Reservation or in federal responsibility to the Sisseton-Wahpeton Sioux. When the Tribe submitted a proposed revised tribal constitution to the Commissioner of Indian Affairs, the Commissioner approved the Constitution, August 26, 1966, containing the following clause:

> ARTICLE I – JURISDICTION
>
> The jurisdiction of the Sisseton-Wahpeton Sioux Tribe shall extend to lands lying in the territory within the original confines of the Lake Traverse Reservation as described in Article III of the Treaty of February 19, 1867.[32]

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Facilities as of 1971, Compiled by the Bureau of Indian Affairs in Cooperation with the Geological Survey, United States Department of the Interior, Bureau of Indian Affairs. In light of the contrary textual material accompanying the 1892-1908 maps and the clear cartographic record since 1908, the omission of the Lake Traverse Reservation from the 1892-1908 maps appears insignificant.

[32] The original Constitution of the Sisseton-Wahpeton Sioux Tribe, approved by the Commissioner of Indian Affairs on October 16, 1946, contained the following language in Article I:

> The jurisdiction of the Sisseton-Wahpeton Sioux Tribe shall extend to all Indian-owned lands lying in the territory within the orignal confines of the Sisseton-Wahpeton Lake Traverse Sioux Reservation.

The South Dakota Supreme Court has construed this language as a tribal recognition of "the limited extent of their jurisdiction." *Application of DeMarrias, supra,* 91 N.W.2d at 489. The limitation on jurisdiction in the 1946 Constitution was self-imposed and did not result from a statutory or judicial restriction.

The lands described in Article III of the 1867 Treaty include those disposed of under the 1891 Act, including the townsite of Sisseton. Thus, the Commissioner of Indian Affairs contemplated no lessening of federal responsibility throughout the area embraced within the 1867 Treaty reservation, emphasizing that the townsite of Sisseton and other surplus land tracts are in Indian Country for jurisdictional purposes. The Code of the Sisseton-Wahpeton Sioux asserts a jurisdiction coextensive with Article I of the Tribe's Constitution. [33]

Special note should be taken of the fact that during the past year vigorous tribal administration has achieved at least *de facto* jurisdiction over all Indians within the 1867 Treaty boundaries of the Lake Traverse Reservation

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[33] The pertinent language from the Code, Chapter 1, §2(a) is:

> The [Sisseton-Wahpeton Sioux Tribal] Court shall have a civil and criminal jurisdiction within the boundaries of the Sisseton-Wahpeton Indian Reservation as defined in the Treaty of February 19, 1867 including trust and non-trust lands, all roads, waters, bridges, and lands used for Federal purposes.

The Constitution and Code were adopted by tribal members residing throughout the 1867 Treaty reservation, without regard to the trust or non-trust status of their place of abode. The Sisseton and Wahpeton Sioux have divided the land and Indian population, within the original 1867 Treaty reservation, into seven districts. All Indians living in these districts may participate in tribal and district government. Leaders elected from these districts to the tribal council make laws for all Sisseton and Wahpeton Sioux. The Constitution was approved by the Commissioner of Indian Affairs, in part because these procedures had been followed. The trust or non-trust status of the land has no significance to this tribal onganization and operation.

through the operation of a police force and a court. Various state agencies, including police and social services, defer to and recognize the jurisdiction of these tribal entities. These agencies had formerly processed Indians through the state judicial machinery. The willingness of the State to abstain from application of its judicial and law enforcement system over Indians and to relinquish jurisdiction to the Tribe demonstrates that state assumption of jurisdiction merely filled a vacuum of unexercised, though existing, tribal jurisdiction.

Legal opinions by Department of Interior solicitors also concur that the present boundaries of the Lake Traverse Reservation are identical to those established in the 1867 Treaty. *Jurisdiction of the State of South Dakota to Prosecute Indians for Violations of the State Game Laws on Allotted Lands Within the Boundaries of the Sisseton Reservation,* Solicitor's Opinion, June 5, 1943, 58 I.D. 455; *Establishment of Tribal Judicial System, Sisseton-Wahpeton Sioux Tribe,* Field Solicitor's Opinion, June 9, 1972; *Boundaries of Lake Traverse Indian Reservation,* Field Solicitor's Opinion, August 16, 1972.

The consistent administrative construction of the 1891 Act and the Federal administration of the entire 1867 Treaty area as a reservation exclude a construction that the 1891 Act disestablished or diminished the reservation.

III.

THE DECISION OF THE SOUTH DAKOTA SUPREME COURT CONFLICTS WITH FEATHER, MATTZ, SEYMOUR, CONDON AND NEW TOWN AND SHOULD BE OVERRULED.

The basic holding of the court below is that the 1891 Act diminished the Lake Traverse Reservation by restoring to the public domain those portions opened to settlement. [34] 211 N.W. 2d at 845. No express or clearly implied statutory language is cited to support this conclusion, although the court suggests that the language is "plain and unambiguous." 211 N.W.2d at 846.[35] The surrounding circumstances and the legislative history of the 1891 Act are not discussed. The theory of the court is that by the 1891 Act, the Sisseton and Wahpeton Sioux sold their "surplus" lands to the United States and the United States "agreed to purchase the land ourtight." 211 N.W.2d at 843. The United States was not acting in the capacity of trustee "to sell the land for the Indians and credit the proceeds to the tribe." *Id.* The court distinguishes *Seymour* and *New Town* where the Acts opening for settlement the Colville and Fort Berthold reservations respectively, specifically provide for the

[34] Public domain land is not Indian Country.

[35] An Eighth Circuit decision cited by the court below to support its holding found that the provisions of the 1891 Act are "somewhat ambiguous" on the disposition of the lands opened for settlement. *DeMarrias v. State of South Dakota, supra,* 319 F.2d at 847. On reconsideration of the issue, *DeMarrias* was overruled. Since 1867, "Congress has not through clear expression or by innuendo shown an intention to disestablish" the Lake Traverse Reservation. *United States ex rel. Feather v. Erickson, supra,* 489 F.2d at 102.

United States to act as trustee for the Indians in the disposition and sales of their lands. Act of March 22, 1906, c.1126, §9,34 Stat. 80 (Colville) and Act of June 1, 1910, c.264, §14, 36 Stat. 455 (Fort Berthold).

A. The holding of the South Dakota Supreme Court is based entirely on the overruled DeMarrias decision.

The total reliance of the court below on *DeMarrias v. State of South Dakota,* 206 F. Supp. 549 (D.S.D. 1962), aff'd 319 F.2d 845 (CA8 1963) compels careful scrutiny of that opinion. In finding an "implicitedly (sic) inscribed" Congressional intent to diminsh the reservation, separate jurisdiction and end Indian Country on the reservation, the District Court in *DeMarrias* relied on *United States v. LaPlant,* 200 F. 92 (D.S.D. 1911); *State of South Dakota v. Sauter,* 48 S.D. 409, 205 N.W.2d 25 (1925); *State ex rel. Hollow Horn Bear v. Jameson,* 77 S.D. 527, 95 N.W.2d 181 (1959); *Hollister v. United States,* 145 F. 773 (CA8 1906); and *Bates v. Clark,* 95 U.S. 204 (1877). The District Court accepted the *LaPlant* proposition, and cites the South Dakota Enabling Act of February 22, 1889; c. 180, 25 Stat. 676 in support,[36] that Indian Country ceased to be such

[36] The South Dakota Supreme Court below quotes the District Court *DeMarrias* decision. 211 N.W.2d at 846. The 1889 Act referenced in that quote is the Act of February 22, 1889; c. 180, 25 Stat. 676, South Dakota's Enabling Act. In the Enabling Act, §4, c1.2, South Dakota disclaims jurisdiction over lands owned and held by Indians. The *DeMarrias* court concludes that once Indian title is extinguished, State jurisdiction obtains. The District Court construes the 1891 Act as an extinguishment of Indian title to the

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whenever Indians lost title to the land. *Sauter* is based entirely on *LaPlant; Bates* and *Hollister* utilize identical reasoning. *Bates* construed an 1834 statute that by 1883 was no longer in effect. *Ex Parte Crow Dog,* 109 U.S. 556 (1883). The *LaPlant* and *Bates* view are "no longer viable" and have been "laid to rest" by 18 U.S.C. §1151. *United States ex rel. Condon v. Erickson, supra,* 478 F.2d at 688-689. After *Mattz, Seymour, Condon, New Town* and *State of South Dakota v. Molash, supra, Sauter* and *Hollister* are devoid of credibility. *Hollow Horn Bear* is also no longer in accord with current interpretations of surplus land statutes. In reaching the conclusion that an area of the original Pine Ridge Reservation was disestablished by the surplus land Act of May 27, 1910; c. 257, 36 Stat. 440, *Hollow Horn Bear* relied on an interpretation of 18 U.S.C.§1151(c) which has been ruled incorrect. *Beardslee v. United States,* 387 F.2d 280 (CA8 1967) (Blackmun, J.). The area held to be disestablished in *Hollow Horn Bear* continues to be part of the Pine Ridge Reservation. *Putnam v. United States,* 248 F.2d 292 (CA8 1957).

The District Court attempts to distinguish *Seymour* from the facts applicable to the Lake Traverse Reservation on the basis that the south half of the Colville Reservation is a closed reservation, rendering

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lands opened for settlement. This interpretation overlooks the tribally retained beneficial title to the entire reservation, despite the fact that individual plots of land within the reservation may pass out of Indian ownership. More importantly, this Court has repeatedly construed identical Enabling Act language as prohibitory of state jurisdiction in the absence of compliance with the Act of August 15, 1953, *supra,* or the Act of April 11, 1968, *supra. McClanahan v. Arizona State Tax Commission, supra,* 411 U.S. at 175, fns. 13 and 14; and *Williams v. Lee, supra,* 358 U.S. at 255, fn. 10.

Seymour inapplicable to interpretation of statutes involving open reservations such as Lake Traverse. 206 F. Supp. at 552-553. The distinction between "opened" and "closed" reservations is without basis[37] and leads the

[37] The South Dakota Supreme Court also subscribes to the "open" - "closed" distinction. *Application of DeMarrias, supra; Kain v. Wilson, supra; Smith v. Temple, supra; State ex rel. Swift v. Erickson*, 82 S.D. 60, 141 N.W.2d 1 (1966); *State v. Barnes*, 81 S.D. 511, 137 N.W.2d 683 (1965); and *Lafferty v. State*, 80 S.D. 411, 125 N.W.2d 171 (1963). The distinction on which the District Court and the South Dakota Supreme Court below relied was based on a misapprehension of the law defining "Indian Country." The dichotomy of "open" and "closed" reservation embraces two fundamental errors. One concerns the definition of "open" and "closed." The other arises from classifying under the Court's definition of "open," not only reservation areas disestablished or diminished through cession and sale to the United States, but reservation areas, though not disestablished or diminished through cession and sale to the United States, where after allotment, lands surplus to allotment are made available for sale to settlers in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards. *Seymour v. Superintendent, supra*, 368 U.S. at 356, the proceeds credited to the tribe.

The terms "open" and "closed" are not words of art. Authoritative definitions are lacking. The *DeMarrias* court and the South Dakota Supreme Court conceive a "closed" reservation to be one that has never been sold to the United States and has never been affected by a surplus land act. It considers all other reservations as "open." Within the scope of these definitions, the Court holds Indians on "open" reservations subject to State jurisdiction, since they are no longer within the boundaries of "Indian Country."

[footnote continued]

court to incorrectly dismiss the 18 U.S.C. §1151(a) definition of Indian Country as inapplicable to *DeMarrias*, on the assumption that having been passed in 1948, 18 U.S.C. §1151(a) has no bearing on events prior

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Administratively, a "closed" reservation is one where all or substantially all of the reservation area is held in tribal ownership so that no checkerboard title pattern can exist. There are few "closed" reservations, none in South Dakota.

Administratively, an "open" reservation is one that has been allotted, or has been allotted and the lands surplus to allotment have been offered for sale with the United States acting as trustee. Such reservations are "open" because a checkerboard title pattern soon ensues as trust allotments pass into fee ownership by sale, devise and inheritance and as "surplus" lands are patented to the buyers. On "open" reservations so defined, the tribes own a very small portion of the reservation area.

This Court has concluded that "opened" portions of the Hoopa Valley and Colville Reservations are in Indian Country. *Mattz, supra; Seymour, supra*, respectively. But the area is not an Indian reservation because it falls within any dichotomy or definition of "open" and "closed." It is an Indian reservation because there was no Federal action to disestablish the reservation. *United States v. Celestine, supra*. The fact that almost every acre within the area was allotted did not disestablish that area of the reservation or exclude the allotments from the reservation. *Tooisgah v. United States*, 186 F.2d 93, 97 (CA10 1950).

It is not possible to stay within the dichotomy of "open" and "closed," as those terms are used in the *DeMarrias* decision, and validly distinguish *Mattz* and *Seymour*. This Court does not employ the terms "open" or "closed." In fact, in *Seymour*, the Court refused to adopt the State's argument that the limits of the reservation were diminished by the purchase of land by non-Indians saying that such a contention was put to rest by the

to that year. The rationale renders *Mattz* and *Seymour* meaningless. The fact that the reservation has been undiminished since 1867 mandates federal jurisdiction.

Flowing from its incorrect assumption that the 1889 Enabling Act and the 1891 Act disestablished the "opened" portions of the reservation, the District Court concludes that Congress approved checkerboard jurisdiction in the northeast corner of South Dakota. The very purpose of a reservation, as a residence for a homogeneous people, would be defeated by a Congressional set aside, as a single reservation, of non-contiguous tracts. Consideration of the practical consequences of checkerboard jurisdiction refutes the inference that Congress approved of it in 1891. *Seymour* describes such jurisdiction as "impractical" and "administratively unworkable."

> ...it seems to us that the strongest argument against the exclusion of patented lands from an Indian reservation applies with equal force to patents issued to non-Indians and Indians alike. For that argument rests upon the fact that where the existence or nonexistence of an Indian reservation, and therefore the existence or nonexistence of federal jurisdiction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, is in the State or Federal Government. 368 U.S. at 358.

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plain language of 18 U.S.C.§1151(a). 368 U.S. at 357-358. If 18 U.S.C.§1151(a) is limited in application to "closed" reservations, the *Mattz* and *Seymour* decisions are inherently contradictory since the reservations affected fall within the definition of an "open" reservation.

Instances of tract book justice do occur on the Lake Traverse Reservation, where patented and trust lands are interspersed in a "crazy-quilt pattern over the entire area." (Pet. App. B 9a). Tract book justice is no justice at all since tract books are never consulted and neither Federal nor State authorities want to assert an unlawful jurisdiction or interfere with one another. Sometimes, the result is to refrain from law enforcement entirely. This would especially be the case where an act violated both Federal or State law or if a composite of acts which violate the laws of both do not, when separated between the jurisdictions in which they were committed, violate the laws of neither. Only exclusive federal jurisdiction solves this porblem, a fact of which Congress was undoubtly aware in 1891. A grant of jurisdiction to the state would not abolish checkerboard jurisdiction since federal jurisdiction over federal trust lands would remain. Without state jurisdiction, Indians violating the law within the reservation would basically be subject to only tribal jurisdiction.[38] Checkerboard jurisdiction places a burden on the United States in fulfilling its fiduciary responsibilities of guardianship and protection of Indians. *Generally in accord, Beardslee, supra; In re Hankins' Petition*, 80 S.D. 435, 125 N.W. 2d 839 (1964); *United States v. Frank Black Spotted Horse*, 282 F. 349 (D.S.D. 1922). It results in a daily exchange of jurisdiction between the Federal Government and the State, unbeknownst to either.[39]

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[38] The major federal preemption of tribal jurisdiction is 18 U.S.C. §1153.

[39] *Frank Black Spotted Horse, supra*, 282 F. at 353-354, cited with approval in *Seymour*, 368 U.S. at 358 fn. 16, states: "Not a day passes but there are changes by the government passing its

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It also makes a hollow shell of the internal sovereignty of the tribe. Many Sisseton and Wahpeton Sioux do not live on federal trust land. Checkerboard jurisdiction with its unworkable jurisdictional limits defeats the right of tribal self-government. In addition, tribal law and federal law are often different from state law. Checkerboard jurisdiction forces each tribal member, who lives on or transacts business and family affairs on federal trust land, to be constantly aware of the legal status of the land on which he stands at any given moment. This is an impossible burden, which also contemplates a rearrangement in living customs from Indian ways to white ways (lest one risk violation of state law) and back again many times a day and every few paces traveled.

The District Court attempts to distinguish *Seymour* but incorrectly interprets its import. The Court states that *Seymour* requires Congress to make an express

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titles to tracts of land somewhere within the boundaries of these reservations.... the title passes by the action of the officers in Washington with reference to it. The patent issues to some Indians in this particular reservation. We all understand that these patents lie there in the office of the Secretary of Interior for weeks...and yet the title to these tracts has passed, as a matter of law. It is just as well understood that the patents...have been sent out to the agents of the respective reservations, and then placed in the safe...and many of them have not yet been made public....

If the contention of the defendant is to be adopted, then all of these patents that have been issued, no matter when or where they are, extinguish the title of the government... I can see how impractical it would be and such a determination would necessitate the Department of Justice...having some agent down there notifying the district attorney regularly and continuously of the changes made to the end that the jurisdiction might be determined. This, I think, was never the purpose of this legislation.

reservation for the use and occupancy of Indians in order to establish continued federal Indian jurisdiction over surplus lands. In fact, the opposite is true. National policy presumes federal Indian jurisdiction and requires express statutory language to controvert the presumption. *Seymour, supra.* The error of the District Court lies in comparing the broad language of sale and relinquishment of title in the Agreement ratified by the 1891 Act with the vacation and restoration of the north half of Colville to the public domain. The 1891 Act did not so vacate and restore.

Many surplus land statutes, affecting areas clearly in Indian Country today, use this broad divestiture language. The statutes were enacted pursuant to the Federal duty of protection and must be construed in this light. "Protection does not imply the destruction of the protected." *Worcester v. Georgia, supra,* 31 U.S. at 551. *Accord, United States v. Kagama,* 118 U.S. 375, 383-384 (1886). The technical divestiture language wholly unfamiliar to the Indians must be given meaning as the Indians would have naturally understood it. *Jones v. Meehan,* 175 U.S. 1, 10-11 (1899). Considering the effect of legal language of "cession," Chief Justice John Marshall stated: "It is...inconceivable that the Indians could have supposed themselves, by a phrase slipped into an article...to have divested themselves of the [general] right of self-government," and their reservation. *Worcester v. Georgia, supra,* 31 U.S. at 553. This is equally true for the Sisseton-Wahpeton Sioux, as they contemplated no alteration of the reservation by the release of land to settlers. The broadness of this language is of no effect. *Morrison v. Work,* 266 U.S. 481 (1925); *Ash Sheep Co. v. United States,* 252 U.S. 159 (1920); *United States v. Brindle,* 110 U.S. 688 (1884).

DeMarrias and the court below do not follow the *Mattz*, *Seymour* and *Condon* tests for termination of the reservation: express language or clear implication from the surrounding circumstances and legislative history.

DeMarrias, the cases on which it is based, and the court below treat all reservation areas affected by surplus land statutes as if they were public lands with the reservation completely disestablished. Every legal underpinning of the *DeMarrias* decision had been swept away prior to the ruling of the South Dakota Supreme Court in *DeCoteau*. Subsequent to the *DeCoteau* decision, *DeMarrias* was expressly overruled. *United States ex rel. Feather v. Erickson, supra.*

Contrary to *DeCoteau* in the court below, *Feather* thoroughly reviewed the surrounding circumstances and legislative history of the 1891 Act. The Eighth Circuit found that the "reservation here was not sold to the government outright but was merely opened for settlement under the homestead laws and the 1887 general allotment plan." 489 F.2d at 101. Based upon the surrounding circumstances, legislative history, subsequent legislative treatment of the reservation, and the clear reservation termination language of contemporaneous enactments, the Eighth Circuit found that the 1891 Act did not express or clearly imply a Congressional intention to terminate the reservation status of the Lake Traverse lands opened for settlement. All lands within the original exterior treaty boundaries of the Lake Traverse Reservation are within Indian Country. *Id.* at 102-103.

B. Seymour and New Town control the DeCoteau situation.

The South Dakota Supreme Court distinguishes *Seymour* and *New Town* from *DeCoteau* on the basis that the 1906 Colville Act and the 1910 Fort Berthold Act, unlike the 1891 Lake Traverse Act, provide that the relationship of the United States to the tribes involved is that of trustee.

In the *Seymour* case, a member of the Colville Indian Band was convicted in a Washington State court of burglary committed on non-trust, fee land in the town of Omak located in the *south* half of the original Colville Reservation. The Lake Traverse Reservation was defined by treaty. By contrast, the original Colville Reservation consisted of an area of public land set aside by Executive Order in 1872 (1 Kappler 916). *Seymour v. Superintendent, supra,* 368 U.S. at 354, fn. 6. Accordingly, while tribal title to the Lake Traverse Reservation was equivalent to a full fee, *Shoshone Tribe v. United States,* 299 U.S. 476, 497 (1937), the Colville Indians were tenants at sufferance on public land of the United States and had no vested property rights in the Executive Order reservation. *Ute Indians v. United States,* 330 U.S. 169, 179 (1947); *Sioux Tribe of Indians v. United States,* 316 U.S. 317 (1942); *Hynes v. Grimes Packing Co.,* 337 U.S. 86, 103 (1949).

By an 1892 statute, Congress, as it was free to do with property of the United States, expressly "restored to the public domain" the *north* half of the Colville reservation and ordered the proceeds from the disposals put in the Treasury of the United States for general public use. Act of July 1, 1892, c.140, 27 Stat. 62, 1 Kappler 441; *Seymour v. Superintendent, supra,* at 355-356.

In 1906 Congress for the first time recognized the Colvilles as the owners of the *south* half of the Executive Order reservation, and, at the same time, after first providing for allotments and reserved lands, opened the "surplus" lands on the south half to sale under the homestead and townsite laws, the proceeds to be credited to the Tribe with the United States acting as trustee. Act of March 22, 1906, c.1126, 34 Stat. 80, 3 Kappler 163. The Indian's offense in *Seymour* took place on fee land in a small town on the south half thus opened.

The Supreme Court of Washington denied the Indian's petition for a Writ of Habeas Corpus on the ground that the site of the burglary was no longer an Indian reservation and therefore not "Indian Country" under 18 U.S.C. §1151(a). The denial rested on the State court's construction of the 1906 Act, an act similar in purpose to the 1891 Lake Traverse Reservation Act.

This Court unanimously reversed. *Seymour v. Superintendent, supra,* at 353. The Court contrasted the Colville 1892 Act (north half) with the Colville 1906 Act (south half). The Court emphasized that whereas under the 1892 Act the land was "restored to the public domain" with proceeds of disposition credited to general public use, the 1906 Act explicitly provided for sale of the lands with the proceeds deposited in the Treasury to the credit of the tribe. *Id.* at 355-356. Adhering to the principle that once a reservation is established, all tracts within it remain a part of the reservation, the Court could not find that the 1906 Act had "taken away from the Colville Indians any part of the land within the boundaries of the area which has been recognized as their reservation since 1892." *Id.* at 359.

Similarly, the 1891 Act did not take away from the Sisseton and Wahpeton Sioux any of the lands within the boundaries of the 1867 treaty reservation. Nothing in that Act evidences an intent to destroy the existence of portions of the Lake Traverse Reservation or "to lessen federal responsibility for and jurisdiction over the Indians having tribal rights[40] on that reservation." *Id.* at 356.

The parallel between *Seymour* and the case at bar is significant. Here, as in *Seymour,* the statute directed the disposal of all unallotted and unreserved tribal lands with the United States acting as trustee. Here, as in *Seymour,* the 1891 Act credited the proceeds to the Tribe, not to the public Treasury. Here, as in *Seymour,* nothing in the express or clearly implied language of the Act, its legislative history, or surrounding circumstances evidences an intent to disestablish or diminish the reservation. Here, as in *Seymour, Id.* at 359, and *Celestine, supra,* those who assert State jurisdiction over Indians cannot point to any Federal law or action extinguishing the reservation status and restoring to the public domain any land within the boundaries of the area recognized and established as the Lake Traverse Reservation. Here, as in *Seymour,* the Act did no more than make available reservation lands deemed "surplus" to the Indians' needs, with the proceeds to be credited to the tribe. Here as in *Seymour,* repeated references to the continued existence of the Lake Traverse Reservation are made and in precisely the manner deemed significant in

[40] There is no question that the tribal relation of the Sisseton and Wahpeton Sioux survived the 1891 Act. *Farrell v. United States, supra.*

Seymour.[41] *Id.* at fn. 11. No valid distinction can be drawn between the south half of Colville and the Lake Traverse Reservation. In a like manner, the language in the 1910 Fort Berthold Act parallels the language in the 1906 Colville Act. See detailed section analysis of the Act in *City of New Town, N.D. v. United States, supra,* 454 F.2d at 123-125. The distinction drawn by the court below between the 1910 Fort Berthold Act and the 1891 Lake Traverse Act is unsupportable. *Seymour* and *New Town* control.

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[41] The repeated references, cited in *Seymour,* to the continued existence of the reservation are contained in §§2, 3, 6, and 12 of the 1906 Colville Act. 368 U.S. at fn. 11. The similarities between these Sections and §§26, 27, 29 and 30 of the Lake Traverse Reservation 1891 Act are apparent.

Section 2 of the Colville Act provides that allotments be made to each member of the Colville Tribe under the General Allotment Act. Sections 26 and 29 of the 1891 Act make the same provisions for members of the Sisseton-Wahpeton Sioux Tribe.

Section 3 of the Colville Act provides for the disposal of surplus lands in the Colville Reservation under the mining laws and the homestead and townsite laws opening the lands for settlement. Section 12 of the Colville Act provides for the disposal of certain surplus lands under a 1902 reclamation law. Section 30 of the 1891 Act makes similar provision for the disposal of surplus lands within the Lake Traverse Reservation.

Sections 6 and 12 of the Colville Act provide that the amounts paid for the lands disposed shall be deposited in the United States Treasury to the credit of the Colville Tribe to be expended for the "education and improvement" of tribal members. Sections 26 and 27 of the 1891 Act make like provision for deposit of land sale proceeds in the United States Treasury to the credit of the Sisseton-Wahpeton Sioux to be used for their "education and civilization." This Court has construed similar language as demonstrating a Congressional intent not to terminate a reservation. *Mattz v. Arnett, supra,* 412 U.S. at 504.

C. Mattz, New Town and Condon presenting closer factual situations than DeCoteau, found the reservations not to have been diminished.

The holding of the South Dakota Supreme Court below is completely inconsistent with the unanimous decision of this Court in *Mattz v. Arnett, supra. Mattz* held that a portion of the present Hoopa Valley Reservation was not terminated under an 1892 act providing for sale to the public of all unallotted, unreserved and unsettled reservation lands, with payment of the proceeds to the Indians' benefit.

The 1892 Act construed in *Mattz* is similar in purpose and effect to the 1891 Lake Traverse Reservation Act. The question of reservation termination in the 1892 Hoopa Valley Reservation Act is closer, however, than in the 1891 Lake Traverse Reservation Act. The Lake Traverse Reservation was established by a negotiated treaty as a "permanent" reservation. The reservation in *Mattz,* like the reservation in *Seymour,* was created by Executive Order. The claim of a tribe on a treaty reservation that its reservation survived a statute opening surplus lands for settlement is at least as substantial as the similar claim by a tribe located on an Executive Order reservation. Unlike the Lake Traverse Reservation, the opening for settlement of "what was Klamath River Reservation," in *Mattz,* was not the consequence of a negotiated agreement between the Tribe and the United States. In the 1892 Act, Congress exercised its plenary power over Indian affairs to sell surplus lands on a reservation set aside by the United States for the Indians' use and occupancy. Nowhere did the 1892 Act state that the United States acted merely as a trustee for the Indians, an omission from the 1891 Act deemed of

overriding significance by the court below in finding that the surplus lands were sold outright. 211 N.W.2d at 845.[42]

Examination of the surrounding circumstances and legislative history of the 1892 Act reveals a "background of repeated legislative efforts to terminate the reservation, and to avoid alloting reservation lands to the Indians." *Mattz v. Arnett, supra,* 412 U.S. at 502. See also, *United States ex rel. Feather v. Erickson, supra,* 489 F.2d at 102. There were also reports that for many years prior to 1892, few Indians continued to reside on the reservation and that white settlers had long occupied much of the reservation. *Mattz v. Arnett, supra,* 412 U.S. at 499-500. In contrast, the legislative history and continuous Indian use and occupation of the Lake Traverse Reservation unambiguously emphasize the fact that no portion of the permanent reservation has ever been terminated. *United States ex rel. Feather v. Erickson, supra,* 489 F.2d at 102. The 1892 Act on a much closer factual situation than that presented by the 1891 Lake Traverse Reservation Act was unanimously held by this Court not to terminate the reservation. *Mattz v. Arnett, supra.* The court below avoids discussion of *Mattz.* The conclusion is inescapable that *Mattz* controls *DeCoteau.*

Comparing its decision in *New Town* with the facts applicable to the Lake Traverse Reservation, the Eighth Circuit found that the subsequent "admittedly inconsistent and confusing" legislative treatment of the Fort Berthold Reservation made for a closer factual

[42] The trustee capacity of the United States in the Lake Traverse and Hoopa Valley reservations openings is implicit from the references to the General Allotment Act in both the 1891 and 1892 acts. *Mattz v. Arnett, supra,* 412 U.S. at 497.

situation.[43] The subsequent legislative treatment of the Lake Traverse Reservation gives no support to a conclusion that the 1891 Act diminished the reservation. *United States ex rel. Feather v. Erickson, supra,* 489 F.2d at 102.

Similarly, in *Condon,* the Eighth Circuit found that the references to a diminished reservation and allotments in the public domain in the 1908 Act, opening for settlement the surplus lands in the Cheyenne River Reservation and the "inconsistent" subsequent Congressional treatment of the reservation presented a close question on the issue of reservation termination. *United States ex rel. Condon v. Erickson, supra,* 478 F.2d at 687-689.[44] When the question of termination is close and the act involved has not expressly or clearly implied a diminishment of the reservation, the state does not have jurisdiction. *Id.* at 689. See, *Mattz v. Arnett, supra,* 412 U.S. at fn.22. Although the 1908 Act in *Condon* is analogous in all material respects to the 1891 Lake Traverse Reservation Act, the court below does not mention *Condon.* This Court should adhere to the *Feather* analysis that the 1891 Act did not disestablish or diminish the Lake Traverse Reservation and that the question is not close. 489 F.2d at 102.

[43] The Eighth Circuit reached this conclusion in the face of 1910 statutory language that "clearly by its own terms does not purport to alter the reservation boundaries." *City of New Town, N.D. v. United States, supra,* 454 F.2d at 125.

[44] In construing, with reference to the opening of the Standing Rock Sioux Reservation, a 1913 statute analogous to the one construed in *Condon,* the South Dakota Supreme Court held that the reservation status was unaffected by the statute. *State of South Dakota v. Molash, supra.*

There is only one basis for distinguishing *Mattz, Seymour, Condon* and *New Town*. This is to demonstrate the presence of Federal action that disestablished or diminished the Lake Traverse Reservation. That cannot be done. There is no such Federal action.

IV.

THE SISSETON-WAHPETON SIOUX TRIBE HAS EXCLUSIVE JURISDICTION TO MAKE CUSTODY DETERMINATIONS AFFECTING ITS MINOR CHILDREN.

The customs and laws of the Tribe control the relations of the Sisseton and Wahpeton Sioux among themselves until Congress expressly directs otherwise. "At an early period it became the settled policy of Congress to permit the personal and domestic relations of the Indian with each other to be regulated ...according to their tribal customs and laws." *United States v. Quiver*, 241 U.S. 602, 603-604 (1916). See also *McClanahan v. Arizona State Tax Commission, supra*, 411 U.S. at 168-169; *Begay v. Miller*, 70 Ariz. 380, 222 P.2d 624, 626-628 (1950). So long as the Sisseton and Wahpeton Sioux have continuing tribal relations, the tribe has a right of self-government that connot be impaired by the exercise of state jurisdiction. *McClanahan v. Arizona State Tax Commission, supra*, 411 U.S. at 169; *United States v. Kagama, supra*, 118 U.S. at 381; *The Kansas Indians, supra*, 72 U.S. at 755, *Yakima Joe v. To-is-lap*, 191 F. 516, 518 (D. Ore. 1910); *In re Lelah-puc-ka-chee*, 98 F. 429 (N.D. Ia. 1899).

There is no greater threat to "essential tribal relations" and no greater infringement on the right of the Indians to govern themselves, *Williams v. Lee, supra*, 358 U.S. at 219-220, 223, than to interfere with tribal control over its membership and the custody of its children.

Subjecting the sanctity of the Indian family to the application of State laws strikes at the root of tribal life and cultural integrity and "cause[s] constant confusion in the affairs of the Indians." *In re Lelah-puc-ka-chee, supra*, 98 F. at 432.

By paralyzing the ability of the tribe to perpetuate itself, State intrusion in parent-child relationships within the Tribe is ultimately the most severe method of undermining retained tribal sovereignty. [45]

> If tribal sovereignty is to have any meaning at all at this juncture of history, it must necessarily include the right, within its own boundaries and membership, to provide for the care and upbringing of its young, a *sine qua non* to the preservation of its identity.
>
> *Wisconsin Potowatomies of the Hannahville Indian Community v. Houston*, File M-56-72 CA (W.D. Mich. 1973). See also, *Blackwolf v. District Court of the Sixteenth Judicial District*, 159 Mont. 523, 493 P.2d 1293 (1972); *State ex rel. Adams v. Superior Court, supra*, and *In re Colwash*, 57 Wash. 2d 196, 356 P.2d 994 (1960) (State court jurisdiction over Indian children denied.)

Nationally, "the Indian child-welfare crisis is of massive proportions." Oversight Hearings on the Welfare of Indian Children, Before the Subcommittee on Indian Affairs, United States Senate, Statement of William Byler, 93d Cong., 2d Sess. (April 8, 1974). "In South Dakota, 40 per cent of all adoptions made by the State's Department of Public Welfare since 1967-68 are Indian children, yet Indians make up only 7 per cent of the

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[45] *Wisconsin v. Yoder*, 406 U.S. 205 (1972) is instructive of this Court's commitment to unique peoples in the face of State laws threatening their culture and way of life.

juvenile population. The number of South Dakota Indian children living in foster homes is, per capita, nearly 16 times (1600%) greater than the non-Indian rate." *Id.* Proportionally. Sisseton-Wahpeton Sioux children comprise an inordinate number of all South Dakota Indian foster care and adoptive placements. State unilateral usurpation of tribal exclusive jurisdiction without sanction of Congress is the cause.[46]

The Sisseton and Wahpeton Sioux have been explicitly granted the right of self-government by Congress. Article 10. Treaty of February 19, 1867. No subsequent Federal action has affected this right with respect to control over domestic relations. Throughout their tribal community the jurisdiction of the Sisseton-Wahpeton Sioux is exclusive and does not depend on the trust on non-trust status of the lands on which particular acts occur. *Seymour v. Superintendent, supra,* 368 U.S. at 358.

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[46] Since the establishment of a tribal court under a tribal code which makes detailed provision for the protection of children, the State welfare authorities have ceased placing Sisseton-Wahpeton Sioux children. The *Feather* decision reinforced this development. Should the State reassert its jurisdiction the former high rate of placement of Sisseton and Wahpeton Sioux children will likely continue unabated. Thus, the Supervisor, James Antrim, of the Roberts County Welfare Office which in the past has been largely responsible for placements of Sisseton-Wahpeton Sioux children, including those of petitioner, states: "I'm not interested in the [Sisseton-Wahpeton Sioux] tribe.... I understand the extended family relationship, I just don't accept it." "The Indian Adoption Problem," Wall Street Journal, 6, July 12, 1974.

CONCLUSION

South Dakota has never obtained jurisdiction over Indians on the Lake Traverse Reservation. A different conclusion would irreparably interfere with essential tribal relations, effectively dissolve the tribal organization and tend toward the elimination of the Sisseton and Wahpeton Sioux as a tribe.

The judgment of the Supreme Court of South Dakota should be reversed and that Court instructed to grant Petitioner's application for a writ of habeas corpus.

Respectfully submitted,

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August 2, 1974

APPENDIX

TREATY OF FEBRUARY 19, 1867, 15 STAT. 505

Whereas it is understood that a portion of the Sissiton and Warpeton bands of Santee Sioux Indians, numbering from twelve hundred to fifteen hundred persons, not only preserved their obligations to the Government of the United States, during and since the outbreak of the Medewakantons and other bands of Sioux in 1862, but freely perilled their lives during that outbreak to rescue the residents on the Sioux reservation, and to obtain possession of white women and children made captives by the hostile bands: and that another portion of said Sissiton and Warpeton bands, numbering from one thousand to twelve hundred persons, who did not participate in the massacre of the whites in 1862, fearing the indiscriminate vengeance of the whites, fled to the great prairies of the Northwest, where they still remain: and

Whereas Congress, in confiscating the Sioux annuities and reservations, made no provision for the support of these, the friendly portion of the Sissiton and Warpeton bands, and it is believed that they have been suffered to remain homeless wanderers, frequently subject to intense sufferings from want of subsistence and clothing to protect them from the rigors of a high northern latitude, although at all times prompt in rendering service when called upon to repel hostile raids and to punish depredations committed by hostile Indians upon the persons and property of the whites; and

Whereas the several subdivisions of the friendly Sissitons and Warpeton bands ask, through their

representatives, that their adherence to their former obligations of friendship to the Government and people of the United States be recognized, and that provision be made to enable them to return to an agricultural life and be relieved from a dependence upon the chase for a precarious subsistence: Therefore,

A treaty has been made and entered into, at Washington City, District of Columbia, this nineteenth day of February, A.D. 1867, by and between Lewis V. Bogy, Commissioner of Indian Affairs, and William H. Watson, commissioners, on the part of the United States, and the undersigned chiefs and head-men of the Sissiton and Warpeton bands of Dakota or Sioux Indians, as follows, to wit:

Article 1. The Sissiton and Warpeton bands of Dakota Sioux Indians, represented in council, will continue their friendly relations with the Government and people of the United States, and bind themselves individually and collectively to use their influence to the extent of their ability to prevent other bands of Dakota or other adjacent tribes from making hostile demonstrations against the Government or people of the United States.

Article 2. The said bands hereby cede to the United States the right to construct wagon-roads, railroads, mail stations, telegraph lines, and such other public improvements as the interest of the Government may require, over and across the lands claimed by said bands, (including their reservation as hereinafter designated) over any route or routes that may be selected by the authority of the Government, said lands so claimed being bounded on the south and east by the treaty-line of 1851, and the Red River of the North to the mouth of Goose River; on the north by the Goose River and a line running from the source thereof by the most westerly

point of Devil's Lake to the Chief's Bluff at the head of James River, and on the west by the James River to the mouth of Mocasin River, and thence to Kampeska Lake.

Article 3. For and in consideration of the cession above mentioned, and in consideration of the faithful and important services said to have been rendered by the friendly bands of Sissitons and Warpetons Sioux here represented, and also in consideration of the confiscation of all their annuities, reservations, and improvements, it is agreed that there shall be set apart for the members of said bands who have heretofore surrendered to the authorities of the Government, and were not sent to the Crow Creek reservation, and for the members of said bands who were released from prison in 1866, the following-described lands as a permanent reservation, viz:

Beginning at the head of Lake Travers[e], and thence along the treaty-line of the treaty of 1851 to Kampeska Lake; thence in a direct line to Reipan or the northeast point of the Coteau des Prairie[s], and thence passing north of Skunk Lake, on the most direct line to the foot of Lake Traverse, and thence along the treaty-line of 1851 to the place of beginning.

Article 4. It is further agreed that a reservation be set apart for all other members of said bands who were not sent to the Crow Creek reservation, and also for the Cut-Head bands of Yanktonais Sioux, a reservation bounded as follows, viz:

Beginning at the most easterly point of Devil's Lake; thence along the waters of said lake to the most westerly point of the same; thence on a direct line to the nearest point on the Cheyenne River; thence down said river to a point opposite the lower end of Aspen Island, and thence on a direct line to the place of beginning.

Article 5. The said reservations shall be apportioned in tracts of (160) one hundred and sixty acres to each head of a family or single person over the age of (21) twenty-one years, belonging to said bands and entitled to locate thereon, who may desire to locate permanently and cultivate the soil as a means of subsistence: each (160) one hundred and sixty acres so allotted to be made to conform to the legal subdivisions of the Government surveys when such surveys shall have been made; and every person to whom lands may be allotted under the provisions of this article, who shall occupy and cultivate a portion thereof for five consecutive years shall thereafter be entitled to receive a patent for the same so soon as he shall have fifty acres of said tract fenced, ploughed, and in crop: *Provided*, That said patent shall not authorize any transfer of said lands, or portions thereof, except to the United States, but said lands and the improvements thereon shall descend to the proper heirs of the persons obtaining a patent.

Article 6. And, further, in consideration of the destitution of said bands of Sissiton and Warpeton Sioux, parties hereto, resulting from the confiscation of their annuities and improvements, it is agreed that Congress will, in its own discretion, from time to time make such appropriations as may be deemed requisite to enable said Indians to return to an agricultural life under the system in operation on the Sioux reservation in 1862; including, if thought advisable, the establishment and support of local and manual-labor schools; the employment of agricultural, mechanical, and other teachers; the opening and improvement of individual farms; and generally such objects as Congress in its wisdom shall deem necessary to promote the agricultural improvement and civilization of said bands.

Article 7. An agent shall be appointed for said bands, who shall be located at Lake Traverse; and whenever there shall be five hundred (500) persons of said bands permanently located upon the Devil's Lake reservation there shall be an agent or other competent person appointed to superintend at that place the agricultural, educational, and mechanical interests of said bands.

Article 8. All expenditures under the provisions of this treaty shall be made for the agricultural improvement and civilization of the members of said bands authorized to locate upon the respective reservations, as hereinbefore specified, in such manner as may be directed by law; but no goods, provisions, groceries, or other articles – except materials for the erection of houses and articles to facilitate the operations of agriculture–shall be issued to Indians or mixed-bloods on either reservation unless it be in payment for labor performed or for produce delivered: *Provided*, That when persons located on either reservation by reason of age, sickness, or deformity, are unable to labor, the agent may issue clothing and subsistence to such persons from such supplies as may be provided for said bands.

Article 9. The withdrawal of the Indians from all dependence upon the chase as a means of subsistence being necessary to the adoption of civilized habits among them, it is desirable that no encouragement be afforded them to continue their hunting operations as means of support, and, therefore, it is agreed that no person will be authorized to trade for furs or peltries within the limits of the land claimed by said bands, as specified in the second article of this treaty, it being contemplated that the Indians will rely solely upon agricultural and mechanical labor for subsistence, and that the agent will

supply the Indians and mixed-bloods on the respective reservations with clothing, provisions, &c., as set forth in article eight, so soon as the same shall be provided for that purpose. And it is further agreed that no person not a member of said bands, parties hereto whether white, mixed-blood, or Indian, except persons in the employ of the Government or located under its authority, shall be permitted to locate upon said lands, either for hunting, trapping, or agricultural purposes.

Article 10. The chiefs and head-men located upon either of the reservations set apart for said bands are authorized to adopt such rules, regulations, or laws for the security of life and property, the advancement of civilization, and the agricultural prosperity of the members of said bands upon the respective reservations, and shall have authority, under the direction of the agent, and without expense to the Government, to organize a force sufficient to carry out all such rules, regulations, or laws, and all rules and regulations for the government of said Indians, as may be prescribed by the Interior Department: *Provided*, That all rules, regulations, or laws adopted or amended by the chiefs and head-men on either reservation shall receive the sanction of the agent.

In testimony whereof, we, the commissioners representing the United States, and the delegates representing the Sissiton and Warpeton bands of Sioux Indians, have hereunto set our hands and seals, at the place and on the day and year above written.

Lewis V. Bogy,
Commissioner of Indian Affairs.
W.H. Watson.

Act of March 3, 1891, 26 Stat. 1035.

SEC. 26. That the following agreement entered into on behalf of the United States by Eliphalet Whittlesey, D. W. Diggs, and Charles A. Maxwell, commissioners on the part of the United States, on the twelfth day of December, eighteen hundred and eighty-nine, with the Sisseton and Wahpeton bands of Dakota or Sioux Indians now on file in the Department of the Interior, signed by said commissioners for the United States, and for said Indians by Simon Ananangmari and others, is hereby accepted, ratified, and confirmed, and is in the following words, to wit:

"Whereas, by section five of the act of Congress entitled 'An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and Territories over the Indians, and for other purposes,' approved February eighth, eighteen hundred and eighty-seven, it is provided 'That at any time after lands have been allotted to all the Indian of any tribe, as herein provided, or sooner,' if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by the said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservations not allotted as such tribe shall from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by

Congress; and the form and manner of executing such release shall also be prescribed by Congress.

Whereas the Sisseton and Wahpeton bands of Dakota or Sioux Indians are desirous of disposing of a portion of the land set apart and reserved to them by the third article of the treaty of February nineteenth, eighteen hundred and sixty-seven, between them and the United States, and situated partly in the State of North Dakota and partly in the State of South Dakota:

Now, therefore, this agreement made and entered into in pursuance of the provisions of the Act of Congress approved February eighth, eighteen hundred and eighty-seven, aforesaid, at the Sisseton Agency South Dakota, on this the twelfth day of December, eighteen hundred and eighty-nine, by and between Eliphalet Whittlesey, D. W. Diggs, and Charles A. Maxwell, on the part of the United States, duly authorized and empowered thereto, and the chiefs, head-men, and male adult members of the Sisseton and Wahpeton bands of Dakota or Sioux Indians, witnesseth:

Article I.

The Sisseton and Wahpeton bands of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said bands of Indians as aforesaid remaining after the allotments and additional allotments provided for in article four of this agreement shall have been made.

Article II.

In consideration for the lands ceded, sold, relinquished, and conveyed as aforesaid, the United States stipulates and agrees to pay to the Sisseton and Wahpeton bands of Dakota or Sioux Indians, parties hereto, the sum of two dollars and fifty cents per acre for each and every acre thereof, and it is agreed by the parties hereto that the sum so to be paid shall be held in the Treasury of the United States for the sole use and benefit of the said bands of Indians; and the same, with interest thereon at three per centum per annum, shall be at all times subject to appropriation by Congress for the education and civilization of the said bands of Indians, or members thereof, as provided in section five of an act of Congress, approved February eighth, eighteen hundred and eighty-seven, and entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and Territories over the Indians, and for other purposes:" *Provided*, That any religious society or other organization now occupying, under proper authority, for religious or educational work among the Indians, any of the land in this agreement ceded, sold, relinquished, and conveyed shall have the right, for two years from the date of the ratification of this instrument, within which to purchase the lands so occupied at a price to be fixed by the Congress of the United States: *Provided further*, That the cession sale, relinquishment, and conveyance of the lands described in article one of this agreement shall not take effect and be in force until the sum of three hundred and forty-two thousand seven hundred and seventy-eight dollars and thirty-seven cents, together with the sum of eighteen thousand and four hundred dollars, shall have been paid

to said bands of Indians, as set forth and stipulated in article third of this agreement.

Article III.

The United States stipulates and agrees to pay to the Sisseton and Wahpeton bands of Dakota or Sioux Indians, parties hereto, per capita, the sum of three hundred and forty-two thousand seven hundred and seventy-eight dollars and thirty-seven cents, being the amount found to be due certain members of said bands of Indians who served in the armies of the United States against their own people, when at war with the United States, and their families and descendants, under the provisions of the fourth article of the treaty of July twenty-third, eighteen hundred and fifty-one, and of which they have been wrongfully and unjustly deprived by the operation of the provisions of an act of Congress approved February sixteenth, eighteen hundred and sixty-three, and entitled "An act for the relief of persons for damages sustained by reason of depredation, and injuries by certain bands of Sioux Indians"; said sum being at the rate of eighteen thousand four hundred dollars per annum from July first, eighteen hundred and sixty-two, to July first, eighteen hundred and eighty-eight less their pro rata share of the sum of six hundred and sixteen thousand and eighty-six dollars and fifty-two cents, heretofore appropriated for the benefit of said Sisseton and Wahpeton bands of Dakota or Sioux Indians, as set forth in report numbered nineteen hundred and fifty-three, of the House of Representatives, Fiftieth Congress, first session.

The United States further agrees to pay to said bands of Indians, per capita, the sum of eighteen thousand and four hundred dollars annually from the first day of July,

eighteen hundred and eighty-eight, to the first day of July, nineteen hundred and one, the latter date being the period at which the annuities to said bands of Indians were to cease, under the terms of the fourth article of the treaty of July twenty-third, eighteen hundred and fifty-one, aforesaid; and it is hereby further stipulated and agreed that the aforesaid sum of three hundred and forty-two thousand seven hundred and seventy-eight dollars and thirty-seven cents, together with the sum of eighteen thousand and four hundred dollars, due the first day of July, eighteen hundred and eighty-nine, shall become immediately available upon the ratification of this agreement.

Article IV.

It is further stipulated and agreed that there shall be allotted to each individual member of the bands of Indians, parties hereto, a sufficient quantity, which, with the lands heretofore allotted, shall make in each case one hundred and sixty acres, and in case no allotment has been made to any individual member of said bands, then an allotment of one hundred and sixty acres shall be made to such individual, the object of this article being to equalize the allotments among the members of said bands, so that each individual, including married women, shall have one hundred and sixty acres of land; and patents shall issue for the lands allotted in pursuance of the provisions of this article, upon the same terms and conditions and limitations as is provided in section five of the act of Congress, approved February eighth, eighteen hundred and eighty-seven, hereinbefore referred to.

ARTICLE V.

The agreement concluded with the said Sisseton and Wahpeton bands of Dakota or Sioux Indians, on the eighth day of December, eighteen hundred and eighty-four, granting a right of way through their reservation for the Chicago, Milwaukee and Saint Paul Railway, is hereby accepted, ratified and confirmed.

ARTICLE VI.

This agreement shall not take effect and be in force until ratified by the Congress of the United States.

In witness whereof we have hereunto set our hands and seals the day and year above written.

ELIPHALET WHITTLESEY,
D. W. DIGGS,
CHAS. A. MAXWELL,
On the part of the United States.

The foregoing articles of agreement having been fully explained to us, in open council, we, the undersigned, being male adult members of the Sisseton and Wahpeton bands of Dakota or Sioux Indians, do hereby consent and agree to all the stipulations, conditions, and provisions therein contained.

Simon Ananangmari (his x mark), and others

SEC. 27. That for the purpose of carrying out the terms and provisions of said agreement there be, and hereby is, appropriated, out of any money in the Treasury not otherwise appropriated the sum of two million two hundred and three thousand dollars, of which amount the sum of five hundred and three thousand two hundred dollars shall be immediately available, and the same, or so much thereof as may be necessary, shall be paid as follows, to wit: To

the Sisseton and Wahpeton Indians, parties to this agreement, the sum of three hundred and seventy-six thousand five hundred and seventy-eight dollars and thirty-seven cents, said amount to be distributed per capita. To the scouts and soldiers of the Sisseton, Wahpeton, Medawakanton, and Wapakoota bands of Sioux Indians, who were enrolled and entered into the military service of the United States and served in suppressing what is known as the "Sioux outbreak of eighteen hundred and sixty-two:" or those who were enrolled and served in the armies of the United States in the war of the rebellion, and to the members of their families and descendants, now living, of such scouts and soldiers as are dead, who are not included in the foregoing class, as parties to said agreement, the sum of one hundred and twenty-six thousand six hundred and twenty dollars, said amount to be distributed per capita; and the said sum of five hundred and three thousand and two hundred dollars or so much thereof as may be necessary, when paid to the said Sisseton, Wahpeton, Medowakanton, and Wahpakoota bands of Sioux Indians, their families and descendants, designated in this act, shall be deemed a full settlement of all claims they may have for unpaid annuities, under any and all treaties or acts of Congress up to the thirtieth day of June, eighteen hundred and ninety; *Provided however,* That all contracts or agreements between said Indians or any of them, and agents, attorneys, or other persons for the payment of any part of this appropriation for or on account of fees or compensation to said agents, attorneys or other persons, unless the same have been made, as provided by law, and are yet in force and have been approved by the Department of the Interior, or have been made by and between citizens of the United States are hereby declared null and void, and in such cases the Secretary of the Interior shall cause all moneys herein appropriated to be paid directly to the said

Indians and shall pay no portion of the same, to their said agents or attorneys. And in no event shall a sum exceeding ten per cent be paid to any agent or attorney, and the balance, after deducting the said five hundred and three thousand two hundred dollars, to wit, the sum of one million six hundred and ninety-nine thousand eight hundred dollars, or so much thereof as may be necessary, to pay for lands by said agreement ceded, sold, relinquished, and conveyed at the rate of two dollars and fifty cents per acre, shall be placed in the Treasury of the United States, to the credit of said Sisseton and Wahpeton bands of Dakota or Sioux Indians (parties to said agreement), and the same, with interest thereof at five per centum per annum, shall be at all times subject to appropriation by Congress or to application by order of the President for the education and civilization of said bands of Indians or members thereof.

SEC. 28. That any religious society or other organization now occupying under proper authority any of the lands by said agreement ceded, sold, relinquished, and conveyed shall have the right for a period of two years from the date hereof, within which to purchase the lands so occupied not exceeding one hundred and sixty acres in any one tract at the price paid therefor by the United States under said agreement.

SEC. 29. That in order to further carry out the provisions of said agreement and of this act, the Secretary of the Interior is authorized and directed, as soon as practicable, to cause the additional allotment provided for in said agreement to be made in the manner and form as provided in an act entitled "An act to provide for the allotments of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United

States and Territories over the Indians, and for other purposes," and as provided in any existing amendments of said act, approved February eighth, eighteen hundred and eighty-seven, and to pay the sums hereinbefore made immediately available, first to the parties to said agreement, or their proper representatives, and to appoint suitable officers for such purposes who shall furnish bonds usual in such cases, and whose compensation and expenses shall be paid out of said available funds as the Secretary of the Interior shall direct, and whose lawful acts, when approved by him, shall be final and conculsive.

SEC. 30. That the lands by said agreement ceded, sold, relinquished, and conveyed to the United States shall immediately, upon the payment to the parties entitled thereto of their share of the funds made immediately available by this act, and upon the completion of the allotments as provided for in said agreement, be subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located; *Provided*, That patents shall not issue until the settler or entryman shall have paid to the United States the sum of two dollars and fifty cents per acre for the land taken up by such homesteader, and the title to the lands so entered shall remain in the United States until said money is duly paid by such entryman or his legal representatives, or his widow, who shall have the right to pay the money and complete the entry of her deceased husband in her own name, and shall receive a patent for the same.

18 U.S.C.§1511(62 Stat. 757, as amended by 63 Stat. 94)

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian county", as used in this chapter, means (a) all lands within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

April 11, 1892; 27 Stat. 1017

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA
A PROCLAMATION.

Whereas, by the third article of the treaty between the United States of America and the Sisseton and Wahpeton bands of Dakota or Sioux Indians, concluded February 19, 1867, proclaimed May 2, 1867 (15 U.S. Statutes, p. 505, the United States set apart and reserved for certain of said Indians certain lands, particularly described, being situated partly in North Dakota and partly in South Dakota, and known as the Lake Traverse Reservation; and

Whereas, by agreement made with said Indians residing on said reservation, dated December 12, 1889, they conveyed, as set forth in article one thereof, to the United States, all their title and interest in and to all the

unallotted lands within the limits of the reservation set apart as aforesaid remaining after the allotments shall have been made, which are provided for in article four of the agreement, as follows: "that there shall be allotted to each individual member of the bands of Indians, parties hereto, a sufficient quantity, which, with the lands heretofore allotted, shall make in each case one hundred and sixty acres, and in case no allotment has been made to any individual member of said bands, then an allotment of one hundred and sixty acres shall be made to such individual"; and

Whereas, it is provided in article two of said agreement, "That the cession, sale, relinquishment, and conveyance of the lands described in article one of this agreement shall not take effect and be in force until the sum of $342,778.37, together with the sum of $18,400, shall have been paid to said bands of Indians, as set forth and stipulated in article third of this agreement"; and

Whereas, it is provided in the act of Congress approved March 3, 1891 (26 U.S. Statutes, pp. 1036-1038, Sec. 30), accepting and ratifying the agreement with said Indians:

"That the lands by said agreement ceded, sold, relinquished, and conveyed to the United States shall immediately, upon the payment to the parties entitled thereto of their share of the funds made immediately available by this act, and upon the completion of the allotments as provided for in said agreement, be subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located:

Provided, That patents shall not issue until the settler or entryman shall have paid to the United States the sum of two dollars and fifty cents per acre for the land taken up by such homesteader, and the title to the lands so entered shall remain in the United States until said money is duly paid by such entryman or his legal representatives, or his widow, who shall have the right to pay the money and complete the entry of her deceased husband in her own name, and shall receive a patent for the same," and

Whereas, Payment as required by said act, has been made by the United States; and

Whereas, Allotments as provided for in said agreement, as now appears by the records of the Department of the Interior will have been made, approved, and completed, and all other terms and considerations required will have been complied with on the day and hour hereinafter fixed for opening said lands to settlement.

Now, therefore, I, Benjamin Harrison, President of the United States, do hereby declare and make known that all of the lands embraced in said reservation, saving and excepting the lands reserved for and allotted to said Indians, and the lands reserved for other purposes in pursuance of the provisions of said agreement and the said act of Congress ratifying the same and other, the laws relating thereto will, at and after the hour of twelve o'clock noon (central standard time) on the fifteenth day of April, A.D. eighteen hundred and ninety-two, and not before, be opened to settlement under the terms of and subject to all the terms and conditions, limitations, reservations, and restrictions contained in said agreements, the statutes above specified, and the laws of the United States applicable thereto.

The lands to be opened for settlement are for greater convenience particularly described in the accompanying schedule, entitled "Schedule of lands within the Lake Traverse Reservation opened to settlement by proclamation of the President dated April 11, 1892," and which schedule is made a part hereof.

Warning, moreover, is hereby given that until said lands are opened to settlement as herein provided, all persons, save said Indians, are forbidden to enter upon and occupy the same or any part thereof.

And further notice is hereby given that it has been duly ordered that the lands mentioned and included in this Proclamation shall be, and the same are attached to the Fargo and Watertown land districts, in said States, as follows:

1. All that portion of the Lake Traverse Reservation, commencing at the northwest corner of said reservation; thence south 12 degrees 2 minutes west, following the west boundary of the reservation to the new seventh standard parallel, or boundary line between the States of North and South Dakota; thence east, following the new seventh standard parallel to its intersection with the north boundary of said Indian reservation; thence northwesterly with said boundary to the place of beginning, is attached to the Fargo land district, the office of which is now located at Fargo, North Dakota.

2. All that portion of the Lake Traverse Reservation, commencing at a point where the new seventh standard parallel intersects the west boundary of said reservation; thence southerly along the west boundary of said reservation to its extreme southern limit; thence northerly along the east boundary of said reservation to Lake Traverse; thence north with said lake to the

northeast corner of the Lake Traverse Indian Reservation; thence westerly with the north boundary of said reservation to its intersection with the new seventh standard parallel, or boundary line between the States of North and South Dakota; thence with the new seventh standard parallel to the place of beginning, is attached to the Watertown land district, the office of which is now located at Watertown, South Dakota.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this eleventh day of April, in the year of our Lord one thousand eight hundred and ninety-two, and of the independence of the United States the one hundred and sixteenth.

BENJ HARRISON

By the President:
JAMES G. BLAINE
Secretary of State.

FIELD SOLICITOR'S OPINION RE ESTABLISHMENT OF SISSETON-WAHPETON SIOUX TRIBAL JUDICIAL SYSTEM

[SEAL]

Your reference:
Judicial, Prevention and Enforc. Service

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
U.S. Post Office and Courthouse
P.O. BOX 549
ABERDEEN, SOUTH DAKOTA 57101

Memorandum JUN 9 1972

To: Mr. Wyman D. Babby,
Area Director
Aberdeen Area Office
Bureau of Indian Affairs

From: Field Solicitor, Aberdeen, South Dakota

Subject: Establishment of Tribal Judicial System, Sisseton-Wahpeton Sioux Tribe

By the memorandum dated May 30, 1972, to me from Mr. Don Y. Jensen, the request has been made for my opinion of whether the Sisseton-Wahpeton Sioux Tribe is vested with legal authority to establish a tribal judicial system or department.

In my opinion, such Tribe is vested with authority to establish a tribal judicial system or judicial branch of tribal government although it is not clear whether the members intended the Tribal Council to have the power to do so without an amendment to the Constitution of such Tribe, and the territorial jurisdiction is also unclear.

In Federal Indian Law, page 398, it is stated that:

"(1) An Indian tribe possessed, in the first

instance, all the powers of any sovereign State.

"(2) Conquest rendered the tribe subject to the legislative power of the United States and, in substance, terminated the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but did not by itself terminate the internal sovereignty of the tribe, i.e., its powers of local self-government.

"(3) These internal powers were, of course, subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, many powers of internal sovereignty have remained in the Indian tribes and in their duly constituted organs of government."

These principles were affirmed in *Talton v. Mayes*, 163 U.S. 376, and in *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89.

An examination of the Treaty between the United States and such Tribe dated February 19, 1867, reveals that there was no *express qualification* or *limitation* of the power of such Tribe to administer justice or to regulate the conduct of members. Article 10 of such Treaty reads as follows:

"Article 10. The chiefs and head-men located upon either of the reservations set apart for said bands are authorized to adopt such rules, regulations, or laws for the security of life and property, the advancement of civilization, and the agricultural prosperity of the members of said bands upon the respective reservations, and shall have authority, under the direction of the agent, and without expense to the Government, to organize a force sufficient to carry out all such rules, regulations, or laws, and all rules and regulations for the government of said Indians, as may be prescribed by the Interior Department: Provided, That all rules, regulations, or laws adopted or amended by the chiefs and head-men on either reservation shall receive the sanction of the agent."

It appears that instead of abrogating, qualifying, or limiting the power of such Tribe, the United States *expressly* recognized tribal authority "...to adopt such rules, regulations, or laws for the security of life and property,..." as may be deemed necessary. I believe the United States *expressly* encouraged the tribal members to exercise internal sovereignty in that regard..

Only a few years after such Treaty was completed, Congress declared the end of the treaty-making period with Indian tribes by the Act of March 3, 1871, 16 Stat. 566, 25 U.S.C. §71, but preserved treaty rights by the words: "...but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired."

The case of *Ex Parte Crow Dog*, 109 U.S. 556, was decided a short time thereafter, on December 17, 1883, and held that the murder of an Indian, Spotted Tail, by an Indian, Crow Dog, was an offense exclusively within the jurisdiction of the Tribal Court, and neither the Federal District Court or the Territorial Court for the Territory of Dakota was vested with competent jurisdiction. Significantly, all lesser offenses committed by an Indian against the person or property of another Indian must also have been exclusively within the jurisdiction of the Tribal Court at such time.

As the result of the publicity from the *Crow Dog* case, Congress enacted the so-called Major Crimes Act on March 3, 1885, 23 Stat. 385, which vested exclusive

jurisdiction in the United States District Court of first seven, later ten, and now fourteen offenses. See 18 U.S.C. §1153. The exclusive jurisdiction of all other or lesser offenses committed by an Indian against the person or property of another Indian was undisturbed and remained vested in the Tribal Courts. See 18 U.S.C. §1152. There is no reason to believe the criminal jurisdiction vested in the Sisseton-Wahpeton Sioux Tribe was any different than any other Indian tribe, and constituted a part of the larger rights of internal sovereignty vested in such Tribe.

Later, the Indians of the Sisseton-Wahpeton Sioux Tribe negotiated an agreement with the United States which was ratified by the Act of March 3, 1891, 26 Stat. 1035, however, such Act did not *expressly* qualify or limit the criminal jurisdiction of such Tribe or otherwise deny the power to such Tribe to establish a Tribal Court or administer justice. Such agreement and Act provided for the cession or sale of "...all the unallotted land within the limits of the reservation set apart to said bands of Indians as aforesaid remaining after the allotments and additional allotments provided for in Article four of this agreement shall have been made,..." to the United States. The consideration for such cession or sale was set forth and provision made for payment thereof to the Indians. Section 30 of such Act reads in part as follows:

> "Sec. 30. That the lands by said agreement ceded, sold, relinquished, and conveyed to the United States shall immediately, upon the payment to the parties entitled thereto of the funds made immediately available by this Act, and upon the completion of the allotments as provided for in said agreement, be subject only to entry and settlement

> under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located:

Obviously the latter clause "subject to the laws" referred only to the school sections, were proprietary in scope, and were not intended to affect the civil and criminal jurisdiction over persons.

I have been unable to find any other Act of Congress which may be asserted to have affected the civil and criminal jurisdiction of such Tribe or its power to establish a Tribal Court in the exercise of its residual or internal sovereignty under tribal authority to make its own laws and be ruled by them, as stated in *Williams v. Lee*, 358 U.S. 217.

It is accordingly my opinion that the Sisseton-Wahpeton Sioux Tribe is vested with authority over civil and criminal jurisdiction as a matter of residual internal sovereignty, which Congress has not expressly abrogated, over members of such Tribe, and has the power to establish a Tribal Court for the administration of justice.

The provision of the Constitution and Bylaws of such Tribe must be reviewed to determine whether such power and authority has been retained by the members or has been delegated to the Tribal Council. The *"Powers"* of the Tribal Council are set forth in Article VII of the Constitution approved August 26, 1966, however, it is not clear whether the members intended that the Tribal Council should have the power to enact ordinances to regulate the conduct of members and to establish a Tribal

Court for the administration of justice and to exercise civil and criminal jurisdiction over all appropriate civil actions and tribal offenses. The language in Article VII, Section 1, Subsection (d) "To make rules . . . ." would appear to be nebulous power to establish a judicial department of tribal government which could have comprehensive civil jurisdiction over legal actions involving more than, perhaps, $100,000.00 as well as other litigation having significant effect upon the legal status and property of members and over all tribal offenses less serious than the major crimes where the punishment could be up to $500.00 fine or six months in jail or both.

Reference is made to the 1946 Constitution of such Tribe, now entirely revised, in Article VII, Section 1, Subsection (c), the Tribal Council was vested with power "...to regulate the conduct and domestic relations of members of the tribe..." and in Subsection (h) "...to provide for the appointment of guardians,..." both of which imply more power over civil and criminal jurisdiction and the administration of justice by the establishment of a Tribal Court than does the present Constitution.

In view of such uncertainty, I would recommend an appropriate amendment to the Constitution of such Tribe to resolve the matter and also to secure the approval of the Commissioner of Indian Affairs which may be necessary in any event to secure funds for a police force and court personnel.

The provisions of Article I entitled "Jurisdiction" describe the territorial extent of the executive, legislative, and judicial civil and criminal jurisdiction of such Tribe and extend the same to lands within the original exterior

boundaries of the Sisseton-Wahpeton Indian Reservation described in the Treaty dated February 19, 1867.

In apparent conflict therewith are the cases of *Application of DeMarrias*, (1958), 91 N.W.2d 480, *State v. DeMarrias*, (1961), 107 N.W.2d 255, Cert. denied 368 U.S. 844, 82 S.Ct. 72, *DeMarrias v. State of South Dakota*, (1962), 206 F.Supp 549, appealed and affirmed in *DeMarrias v. State*, (1963), 319 F.2d 845.

At 206 F, Supp. 551, the court declared:

> "The said Acts of 1889 and 1891 and the President's Proclamation, supra, constitute explicit manifestations as of the effective dates thereof of an intent by Congress to restore to the public domain all unallotted lands within the Lake Traverse Reservation which were being opened to settlement under the homestead and townsite laws of the United States and to make those areas subject to the laws of South Dakota.
>
> "Equally well manifested by those Acts, though only implicitedly inscribed, is a Congressional intent to diminish the original area limits of the reservation, to separate jurisdiciton and in the process and as an overall product of the entire arrangement to end 'Indian Country' and the reservation status. The unallotted lands thereafter ceased legally, to be a part of that reservation and therefore not within the 'any Indian reservations' language contained in the relinquishment effected by said laws of 1901 and the Act of 1903."

While I do not agree, personally, with such conclusion, I believe we must face the fact that any tribal member who may be convicted in a Tribal Court established on such Reservation would have the right to petition the Uni-

ted States District Court for a writ of habeas corpus under the provisions of the Indian Civil Rights Act, Public Law 90-284, Section 203, 25 U.S.C. §1303. In that event, the decision in United States District Court would probably follow the holding in *DeMarrias* as legal precedent.

Should it be asserted that such Tribe has abandoned its judicial power or branch of government, I would refer to Federal Indian Law, page 402, to the effect that: "Power and authority rightfully conferred do not necessarily cease to exist in consequence of long nonuser."

In view of the *DeMarrias* decision, the territorial extent of the civil and criminal jurisdiction of such Tribe is nebulous and uncertain, and may only be determined by court action or Act of Congress. As stated in Solicitor's Opinion M-36783, dated September 10, 1969, relative to the authority of the Yankton Sioux Tribe to establish a Tribal Court, it would appear that the cession of unallotted lands by the Yankton Sioux Tribe diminished the area over which the Tribe might exercise its authority but that it did not otherwise terminate legislative authority of the Tribe, and the Tribe retained inherent authority to administer justice in a Tribal Court. In my opinion, the Sisseton-Wahpeton Sioux Tribe is vested with comparable power and authority.

Finally, it should be mentioned that there has been no State assumption of jurisdiction under Public Law 280, 67 Stat. 588, or under Public Law 284, 82 Stat. 73, regarding such Reservation, which prescribed the procedure set forth by Congress for State civil and criminal jurisdiction and the abrogation of tribal jurisdiction.

/s/ Wallace Dunker
Wallace G. Dunker
Field Solicitor

FIELD SOLICITOR'S OPINION RE BOUNDARIES OF LAKE TRAVERSE INDIAN RESERVATION

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
[SEAL] U.S. Post Office and Courthouse
P.O. Box 549
ABERDEEN, SOUTH DAKOTA 57101

Memorandum AUG 16 1972

To: Superintendent, Sisseton Agency

From: Field Solicitor, Aberdeen, South Dakota

Subject: Opinion re Boundaries of Lake Traverse Indian Reservation

The letter dated August 7, 1972, to me from Acting Superintendent Stanislawski has attached a letter dated August 4, 1972, to Mr. Stanislawski from Mr. Jerry Flute, Secretary of the Sisseton-Wahpeton Sioux Tribe. The question presented by Mr. Stanislawski is whether "...State sales tax can be imposed on individuals of Indian descent when such retail and business outlets are included in the Reservation." and Mr. Flute inquires whether "...any communities on the Lake Traverse Reservation have been excluded from the reservation for the purpose of state sales tax."

You will recall that in my memorandum opinion dated June 9, 1972, on the subject of the authority of the Sisseton-Wahpeton Sioux Tribe to establish a tribal judicial system or department, reference was made to the Treaty dated February 19, 1867, which fixed the boundaries of such Reservation. The cases of *United States v. Celestine*, 215 U.S. 278, *Seymour v. Superintendent*, 368 U.S. 351, and *New Town v. United States*, 451 F.2d 121, stand for the following legal principles:

"(1) When Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress.

"(2) The purpose to abrogate treaty rights of Indians is not to be lightly imputed to Congress.

"(3) The opening of an Indian reservation for settlement by homesteading is not inconsistent with its continued existence as a reservation."

As above mentioned, the boundaries of the Lake Traverse Indian Reservation were established by the 1867 Treaty, which boundaries would remain to this date as so fixed in the absence of action by Congress. It has been said that an 1891 Act of Congress has diminished such Reservation boundaries or has separated territory therefrom.

Reference to the Act of March 3, 1891, 26 Stat. 1035, reveals that the basis therefor was therein stated:

> Whereas, by section five of the act of Congress entitled 'An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and Territories over the Indians, and for other purposes,' approved February eighth, eighteen hundred and eighty-seven, it is provided 'That at any time after lands have been allotted to all the Indian of any tribe, as herein provided, or sooner,' if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by the said tribe, in conformity

> with the treaty or statute under which such reservation is held, of such portions of its reservations not allotted as such tribe shall from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress; and the form and manner of executing such release shall also be prescribed by Congress.
>
> "Whereas the Sisseton and Wahpeton bands of Dakota or Sioux Indians are desirous of disposing of a portion of the land set apart and reserved to them by the third article of the treaty of February nineteenth, eighteen hundred and sixty-seven, between them and the United States, and situated partly in the State of North Dakota and partly in the State of South Dakota:"

Such "whereas" clauses clearly indicate that the intent of the Sisseton-Wahpeton Indians and of Congress, as well, was to dispose of unallotted land and that alone. Clearly absent is any intent to diminish the Lake Traverse Indian Reservation, or to change its boundaries or to restore any portion thereof to the public domain. The several articles of such 1891 Act provide only the details of such land transaction and other matters incident thereto. It is accordingly my opinion that Congress did not intend to alter the boundaries of the Lake Traverse Indian Reservation by the Act of March 3, 1891, 26 Stat. 1035.

In the case of *DeMarrias v. State*, 319 F.2d 845, it was held that the Act of March 3, 1891, 26 Stat. 1035, had the effect of diminishing such Reservation, however, the boundary lines of the Reservation thus determined to be

diminished were not therein defined. One of the reasons for my disagreement with such decision is that the 1891 Act failed to expressly diminish such Reservation and failed to set forth necessary boundary lines. In my view, these are essential factors to be covered whenever Congress intends to diminish or to change the boundaries of an Indian reservation.

In the event Congress intends to diminish an Indian reservation, the Act which so declares should specifically describe the area deleted or the area which is to remain as a reservation, or both. If Congress intends to disestablish an Indian reservation, the entire area thereof or at least the unallotted lands should be restored to the public domain in specific language. Where, as here, the Indians merely sold the unallotted lands within the limits of the Reservation set apart by treaty, which remained after allotments to the Indians, and where the unallotted lands are scattered throughout such treaty Reservation, in the absence of clear and specific language, there is no basis to hold that any particular area was excluded or that the Reservation was diminished to any extent. Such are the reasons for my disagreement with *DeMarrias*, however, I am compelled to recognize such decision as legal precedent.

The statutes relating to trading with the Indians, 25 U.S.C. §261-§264, require the regulation of trade in the Indian country or on any Indian reservation. In the case of *Warren Trading Post v. Arizona*, 380 U.S. 685, the United States Supreme Court held that the State sales tax could not be imposed consistently with Federal statutes applicable to Indians on reservations stating: "...these states laws imposing taxes cannot stand." as they impinge upon or frustrate a Federal function.

The opinion of the Associate Solicitor, Indian Affairs, dated April 10, 1972, stated that in addition to the

decision in *Warren Trading Post*, another principle is applicable in view of *Kennerly v. District Court*, 400 U.S. 423 (1971), and *Williams v. Lee*, 358 U.S. 217 (1959), "...that the Indian tribes have the inherent right to govern on-reservation commercial dealings between tribal members and non-Indians and that the states may not interfere with the exercise of tribal self-government absent the consent of Congress."

I should be noted, however, that on April 18, 1972, the Council of the Sisseton-Wahpeton Sioux Tribe adopted Resolution No. 72-47, a copy of which was forwarded to the Area Director by memorandum dated April 25, 1972, from the Superintendent, Sisseton Agency, to the effect that such Tribe was not in favor of the enforcement of trader licensing at such time.

It is my understanding that the Standing Rock Sioux Tribe has prevailed in a legal action against the State of North Dakota relating to the authority to impose State sales and income taxes upon Indians within reservation boundaries. Such court decision is not available at this date.

/s/ Wallace G. Dunker

Wallace G. Dunker
Field Solicitor

cc: Mr. Wyman D. Babby, Area Director,
Aberdeen Area Office, Bureau
of Indian Affairs, Aberdeen,
South Dakota 57401

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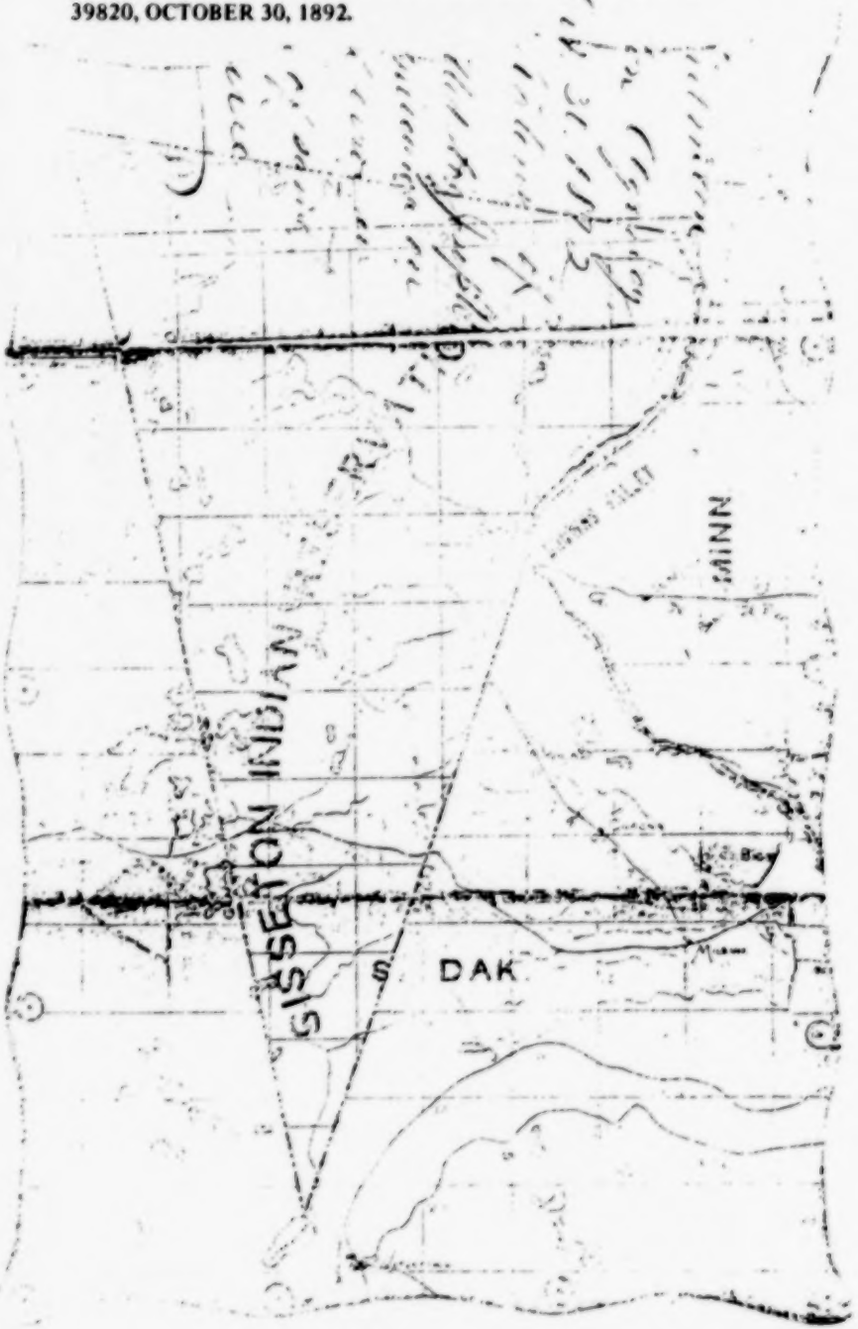
COVER PAGE AND LETTER OF UNITED STATES INDIAN AGENT, NATIONAL ARCHIVES SPECIAL CASE NO. 147, LETTER NO. 39820, OCTOBER 30, 1892.



U. S. INDIAN SERVICE,

Sisseton Agency, D. T.

DCK

May 30 1892.

Hon. Com'r Indian Affairs
Washington D. C.
Sir-

I have the honor to transmit herewith Patent No 24 issued to Joseph Yant. or Mnnecuwa - I find the same to be an error as does not cover the lands selected & improved by him - The lands selected & improved by him & on which he is now & has been living is described as

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follows — South half (S½) North East quarter (N. E¼) & West half of the South East quarter (W½-S E¼) of Section six (6) Township one hundred & twenty five (125) & Range fifty one (51) on the Traverse Reservation - I would respectfully recommend that the surrender of the same enclosed be accepted & the above described land be allotted to the Indian in lieu thereof -

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Very respectfully
D. L. Kinsman
[U.S. Indian Agent]

LETTER AND FIELD NOTES OF UNITED STATES SPECIAL ALLOTING AGENT, NATIONAL ARCHIVES SPECIAL CASE 147, LETTER NO. 40984, NOVEMBER 10, 1891.

United States Indian Service.

LETTER OF COMMISSIONER OF INDIAN AFFAIRS, NATIONAL ARCHIVES LAND DIVISION LETTER BOOK 188.

DEPARTMENT OF THE INTERIOR

OFFICE OF INDIAN AFFAIRS

WASHINGTON August 13, 1889.

Gentlemen:

Upon receipt hereof, you will proceed to the Sisseton Agency, Dakota, for the purpose of negotiating with the Sisseton and Wahpeton Indians for the relinquishment of such portions of the Lake Traverse Reservation not allotted, as said Indains may consent to release.

Such negotiations are authorized by the 5th Section of the Act of February 7, 1887, which provides: "That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time consent to sell, on such terms and conditions as shall be considered just and equitable, between the United States and said tribe, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress".

The Lake Traverse Reservation was created by the 3rd Article of the treaty between the United States and the Sisseton and Wahpeton Bands of Dakota or Sioux Indians, concluded February 19, 1867. (15 Stats. 505).

It contains 818,780 acres, of which some 127,887 acres have been allotted in severalty, and 1,417 acres reserved for church and other purposes, leaving a surplus of some 789,476 acres.

The allotments have virtually been completed although it is possible that some few individuals who were not on the reservation when the allotments were made in 1887 are entitled to allotments.

The treaty makes no provision regarding the cession or relinquishment of the reservation or any portion thereof.

It is understood that the Indians desire to sell a portion at least, of their surplus lands.

You will call a full council of the bands and submit the subject for their consideration. If a majority of such council determine to sell any portion of the reservation, you will then agree upon the quantity of land to be sold, and its location, which should be described by sections, or other legal subdivisions of townships.

It is not considered advisable that the cession at this time should embrace all these surplus lands. A sufficient quantity should be reserved for future contingencies.

The terms and conditions of the sale should then be agreed upon, which should be just and equitable to the Indians, as well as to the United States.

You will explain to the Indians that under the Act of February 8, 1887, the sums agreed to be paid as purchase money, will be paid in the Treasury of the United States for their sole use, the same with interest, thereon at 3 per cent per annum, to be at all times subject to appropriation by Congress for the education and civilization of said Indians.

The terms and conditions agreed upon in Council, with the description of the lands to be relinquished, should be reduced to writing and incorporated in the accompanying

form of agreement, which should be signed by at least a majority of the male adults of the bands.

All such adults should be given an opportunity to sign.

When freely and properly signed, your certificates and the certificate of the Official Interpreter, should be attached to the instrument.

The proceeding of the Council should be reduced to writing and attested by your signatures and that of the Official Interpreter.

The Indians should be informed that the negotiations will not be valid or binding until ratified by Congress.

Very Respectfully,

/s/ T. J. Morgan
Commissioner

NATIONAL ARCHIVES SPECIAL CASE 147,
LETTER NO. 27212

DEPARTMENT OF THE INTERIOR
WASHINGTON

April 22, 1904.

The Commissioner of Indian Affairs,

Sir: -

In accordance with your recommendation of 20th instant, I have requested the Commissioner of the General Land Office to cancel the allotment to Madeline Campbell on the Sisseton reservation, South Dakota, she having been also allotted on the Yankton reservation.

Very respectfully,

4129 Ind. Div. 1904.
JES

/s/ E.A. Hitchcock
Secretary

NATIONAL ARCHIVES SPECIAL CASE 147,
LETTER NO. 58456

DEPARTMENT OF THE INTERIOR
WASHINGTON October 1, 1902.

The Commissioner of Indian Affairs.
Sir:-

I am in receipt of your letter of June 9, 1902, recommending cancellation of an allotment to David Heyoka, on the Sisseton reservation, South Dakota.

Your report shows that there was patented to David Heyoka, November 19, 1892, (No. 373,) the No./2 of NW/4, Sec.33, and the SE/4 of SW/4, Sec. 28, T.130 N., R. 54 W., 5th P.M., S.D., and that there was also patented to David Heyoka, (No. 908,) the N/2 of NE/4, Sec. 3, T.127, R.53, and SW/4 of SE/4, Sec.34, T.128, R.53, 5th P. M., S.D., and also that there was patented to Louis Heyoka July 22, 1889, (No. 1366), the SE/4 of SE/4, Sec.12, T.129 N., R.52 W., 5th P. M., S.D.

Your report shows that David Heyoka and Louis Heyoka are one and the same person, and that David Heyoka desires to retain the lands covered by patents Nos. 908 and 1366, amounting in the aggregate to 160 acres.

Patent No. 373 is returned with your report, with recommendation that the same be cancelled.

I also am in receipt of your report of the 11th ultimo, transmitting patent No. 1366, in the name of Louis Heyoka, with request that the same be cancelled, and that a new one be issued in the name of David Heyoka, covering said lands.

In accordance with your recommendation, I have cancelled patents 373 and 1366, and have requested the

Commissioner of the General Land Office to issue a patent to David Hekoya for the lands covered by patent 1366 to Louis Heyoka.

Very respectfully,

/s/ Thos. Ryan
Acting Secretary.

5070, Ind. Div. 1902
8279 " " "
M.E.W.

NATIONAL ARCHIVES SPECIAL CASE 147,
LETTER NO. 11658

DEPARTMENT OF THE INTERIOR,
UNITED STATES INDIAN SERVICE,

Sisseton Agency, South Dakota,
January 25th, 1906.

Hon. Commissioner of Indian Affairs,
Washington, D.C.

Sir:-

I have the honor to transmit herewith application of Josephine LaFromboise for title in fee to her allotment on this reservation. The applicant is the wife of Joseph LaFromboise of this reservation, and in my opinion is not capable of transacting her own business affairs, being illiterate, even to the extent of inability to sign her own name. Hence I cannot recommend that a patent in fee be issued her.

Very respectfully,
/s/ C.B. Jackson
U.S. Indian Agent.

EJDM.

NATIONAL ARCHIVES SPECIAL CASE 147, LETTER NO. 11658

Sisseton Agency, S.D., January 23, 1905.

Hon. Commissioner of Indian Affairs,
Washington, D.C.

Sir:-

I hereby make application for and request that you recommend to Congress the enactment of a law authorizing the issuance to me of a patent in fee for the following described lands situate on the Lake Traverse Reservation in South Dakota, to-wit: allotment No. 182, for the W½ of the NW¼ of section 5, and the E½ of the NE¼ of section 6, township 127, range 53.

I am a member of the Sisseton Sioux tribe of Indians resident on said reservation and under the jurisdiction of the Hon. C.B. Jackson, U. S. Indian Agent at Sisseton Agency.

I now hold said above described lands under a trust patent, issued pursuant to the Act of Congress of February 8, 1887, and the acts amendatory thereof.

I am perfectly competent to attend to my own business affairs and believe that C.B. Jackson will so certify.

Very respectfully,

Josaphine LaFramboise

Witness G.A. Robertson [her mark]
Samuel Adams

TREASURY DEPARTMENT LETTER RE POPULATION BASE FOR TRIBAL REVENUE SHARING

OFFICE OF THE SECRETARY OF THE TREASURY

WASHINGTON, D.C. 20220

April 25, 1973

Mr. Moses D. Gill
Chairman
Sisseton Wahpeton Sioux Tribe
Sisseton, South Dakota 57262

Dear Mr. Gill,

Account No. 35 6 039 329

We have researched your challenge of the population data used in computing your revenue sharing allocation, and determined that the data we are using is correct. This constitutes a final determination of your population data unless you provide us with additional evidence to support your claim within 60 days from the date of this letter.

We rely mainly on 1970 Census data because, although not perfect, it is based on an actual house to house count following the same procedure in all places. This consistency is important where tribes must be measured in a formula such as revenue sharing. The population that we are using includes all Indian members of your tribe residing on the reservation.

Sincerely yours,

/s/ Arthur L. Hauser

Arthur L. Hauser
Office of Revenue Sharing

NATIONAL ARCHIVES CENTRAL CLASSIFIED FILES, 49766-1934-313 SISSETON

The Honorable,

JUN 27 1935

The Attorney General.

My dear Mr. Attorney General:

I have received your letter of May 13, advising with regard to judgment entered in the case of L.G. Lewis et al. v. Oscar Sjorberg et al., pending in the Circuit Court for the Fifth Judicial Circuit of South Dakota, being an action instituted by the plaintiffs to enjoin the defendants from cutting and removing hay from Drywood Lake in Roberts County, South Dakota.

It appears that the decision of the court was rendered on the ground that Drywood Lake, at the time of the admission of the State of South Dakota into the Union, was a navigable lake, and that no permanent change in its condition has occurred. The question as to the right to cut and remove hay from the Drywood Lake bed lands would, therefore, involve the matter of title or ownership of the lake bed. This lake lies wholly within the boundaries of the Sisseton Indian Reservation.

In the agreement of December 12, 1889, ratified by the Act of March 3, 1891 (36 Stat. 1035-1038), the Indians ceded, sold and conveyed to the United States all their claim, right, title and interest in and to all unallotted lands within the limits of the reservation remaining after the allotments and additional allotments provided for in said agreement should have been made, for a consideration of $2.50 per acre. It would appear that, due to the severe drought in that section of the country for the past two or three years, the lake bed in

question has become dry: and it is presumed that when the rainfall becomes normal the lake will again be filled with water.

Section 359 of the Revised Code of South Dakota reads, in part, as follows:

> "Except where the grant under which the land is held indicates a different intent, the owners of the upland, when it borders upon a navigable lake or stream, takes to the edge of the lake or stream at low water mark, and all navigable rivers shall remain and be deemed public highways."

It is also provided in section 498 of the revised code above referred to that, -

> "Where from natural causes land forms by imperceptible degrees upon the bank of a river or stream, navigable or nonnavigable, either by accumulation of material or by recession of the stream, such lands belong to the owner of the bank, subject to any existing right of way over the bank."

It is believed that in view of the foregoing, the Indian allottees owning lands on the shore of the lake would be entitled to the growth on the dry lake bed lands abutting their allotments, and that such rights as they may have therein should be protected. It appears from recent correspondence received from Indian allottees who are interested in the matter that a situation similar to that of last year will prevail again this year. Copies of this correspondence are enclosed. It is, therefore, requested that such action as the law and the facts may warrant be taken to protect the interest of the Indians in the lake beds in question. The matter of taking an appeal in the present case, as referred to in your letter, is left to your discretion.

In any action that may be instituted, the Superintendent of the Sisseton Agency will be glad to render such assistance as may be in his power.

Very truly yours,
(Sgd.) T.A. Walters
First Assistant Secretary.

6-OL-14
CC to Sisseton Agency.
Enclosure No. 662071.

NATIONAL ARCHIVES SPECIAL CASE 147, LETTER NO. 26163, WITH ATTACHED RESOLUTIONS.

BANK OF MILBANK
MILBANK, DAKOTA

SARGENT & DIGGS, BANKERS.

Gen'l John W. Noble
Sec'y Interior . April 22nd '89
Washington D.C.
My Dear Sir ;

Would you kindly inform me what is the present status [words missing] for opening [words missing] Reservation?

It lies along the western line of our county and Roberts north of us, and is a great detriment to our intresets, as it blocks the progress of two or three lines of railroad that we are very anxious to see completed.

We need these roads badly, and the opening of the reservation would give new impetus to immigration which has been attracted by government lands further west.

Any information that will enable the citizens of this section to render any service that may be needed in hastening the opening will be appreciated.

We also respectfully ask your early attention to the matter if the consummation is left with your department, as I have been informed it is.

If any need should exist for a special agent here, in the opening -, or a commission to be appointed, I trust you will remember

Yours truly -

/s/ D.W. Diggs

RESOLUTIONS OF THE CONVENTION

of Eight Counties that Assembled at Watertown, Dakota, May 1st, 1889, to take Action Relative to the Opening of the Sisseton Indian Reservation.

—o-O-o—

"Whereas, The Sisseton Indian Reservation, lying in the midst of a well settled section of country, is a barrier to the completion of railroads in course of construction or progress, and the general welfare of the country, and is not now necessary to the interests of the Indians, they having taken their allotment of land under the Act of Congress, and,

WHEREAS the Indians on this reservation have certain grievances which they urge as a reason for withholding their consent to final action necessary to opening the Reservation to settlement.

RESOLVED: That it is the sense of this convention composed of citizens of all the counties contiguous to the said Reservation that the government of the United States owes a debt of gratitude to all Indians who were loyal and rendered service or befriended the white man in the terrible scenes of the massacre of 1862, and that Chief Gabriel Renville having been conspicuous as a friend of the government and the white man, the government should recognize such loyalty and service in some substantial form.

RESOLVED, That as citizens we will use our influence to secure to Chief Renville and all other Indians who

were loyal to the government, who are not members of his band, that justice that has been denied them. Confident that the government will promptly accord to them such compensation as in judgment they are under the law entitled, and will see that the provisions of treaties heretofore made are scrupulously carried out to the end, that any wrong to them resulting from neglect shall be speedily redressed.

RESOLVED, That we recommend to Congress, that all men in this band who acted as scouts under Genl. Sibley be suitably rewarded for their loyalty and valuable services.

/s/ D.W. Diggs

Reservation

Milbank 5/13/89

NATIONAL ARCHIVES SPECIAL CASE 147,
LETTER NO. 39462

EXECUTIVE CHAMBER
PIERRE, S.D.
A.C. MELLETTE, GOVERNOR

Hon. John W. Noble, Dec. 13, 1890
Secretary of the Interior,
Washington, D.C.

Dear Sir:–

I have the honor to herewith enclose a petition from numerous indians of the Wahpeton and Sisseton Agency, setting forth their destitute condition and call upon their friends in the east for aid to keep them from starvation. I desire to enter in behalf of their petition my hearty recommendation to the Great Government of the U.S., that it at once take steps to relieve the necessities that this long suffering people who are now in absolute destitution, slowly suffering death from privation and starvation, These are the most peaceable and law abiding Indians within our State and have been rewarded for their virtues during many years, by being left to starvation so far as the government concerns itself, while the lawless and utterly heathenish indians are well fed and armed from year to year. It is sad commentary upon the indian problem and the condition ought to be reversed at once. Let the lawless indians suffer for a few years, and such as the Sissetons and Wahpetons have their rations and you will find a great improvement among these people throughout our State. I sincerely hope that you wil take means for the relief of these indians at once.

Yours Respectfully,

/s/ A. Mellette